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No. 681

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

R. D. HUME, Claimant of the Schooner "Berwick," her Tackle, Apparel, Furniture, and Cargo, *Appellant*,

vs.

J. D. SPRECKELS & BROS. CO.

TRANSCRIPT ON APPEAL.

Appeal from the District Court of the United States for the District of Oregon.

FILMER-ROLLINS CO. PRINT, 424 SANSOME STREET, S. F.

INDEX.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

R. D. HUME, Claimant of the Schooner "Berwick,"

Appellant,

vs.

J. D. SPRECKELS & BROS. CO.,

Respondent.

Order Extending Time to File Record.

Now, at this day, on motion of Mr. John M. Gearin, of proctors for the appellant above-named, and for good cause shown, it is ordered that the time within which said appellant is required to file, in the United States Circuit Court of Appeals for the Ninth Circuit, the record on appeal in the above-entitled cause, be, and the same is hereby, extended twenty days.

Portland, Oregon, January 12, 1901.

CHARLES B. BELLINGER,
United States District Judge, District of Oregon.

[Endorsed]: No. 681. United States Circuit Court of Appeals for the Ninth Circuit. R. D. Hume etc. vs. J. D. Spreckels & Bros. Co. Order Extending Time to File Record. Filed January 25, 1901. F. D. Monckton, Clerk.

In the District Court of the United States for the District of Oregon.

J. D. SPRECKELS & BROS. CO.,
Libelant,

vs.

The Schooner "BERWICK," Her Tackle, Apparel, Furniture, and Cargo.

R. D. HUME,
Claimant.

Caption.

Be it remembered, that on the 20th day of October, 1898, a libel was filed in the District Court of the United States for the District of Oregon, by J. D. Spreckels and Bros. Co., against the Schooner "Berwick," her tackle, apparel, furniture, and cargo, and a stipulation for costs being duly filed a warrant was duly issued for the arrest of said vessel, her tackle, apparel, furniture and cargo. That on the 21st day of October, 1898, said vessel was arrested by the United States marshal for said District. On the 22d day of October, 1898, a claim and stipulation for costs were duly filed by R. D. Hume, as the owner of said schooner. That said J. D. Spreckels & Bros. Co., as libelant of said schooner, and said R. D. Hume, as the claimant of said schooner, are the only parties to said cause. That on said 22d day of October, 1898, a stipu-

lation of the said libelant and claimant was duly filed fixing the value of said schooner, and a stipulation of said claimant to abide by and pay the decree, in the sum of $2,000, and duly approved by Charles B. Bellinger, District Judge, being given to the marshal, on said 22d day of October, 1898, the said marshal released said schooner, her tackle, apparel, furniture, and cargo, to said claimant. That on the 6th day of December, 1898, an answer was filed by said claimant. That on the 28th day of December, 1898, pursuant to a stipulation of the parties and an order of the Court, a commission was issued appointing L. S. B. Sawyer a commissioner to take the testimony of such witnesses residing in San Francisco, State of California, as either party might produce before him. Said testimony so taken by said commissioner was duly returned to this Court and filed on the 26th day of June, 1899. Said testimony, together with the testimony taken before the Court upon the trial of said cause is included in the bill of exceptions filed herein by said claimant.

That on November 20 and 22, 1900, said cause came on for trial before the Honorable Charles B. Bellinger, United States District Judge for the District of Oregon, upon the pleadings and proofs, and on said 22d day of November, 1900, said Court made and entered in said cause its findings and final decree. That on the 14th day of December, 1900, said claimant filed in said cause his bill of exceptions, and on said 14th day of December, 1900, also filed in said cause his notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, together with a petition for appeal, an assignment

of errors on appeal, an undertaking on appeal in the sum of $1,000 approved by Charles B. Bellinger, District Judge, and an order allowing such appeal. That on the 27th day of December, 1900, a citation was duly signed by the Charles B. Bellinger, District Judge, and on the 31st day of December, 1900, was served upon the proctor for the said libelant, and filed in said Court on the 8th day of January, 1901. That no questions in said cause were referred to a commissioner or commissioners. That the following record contains the papers and records in accordance with the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

On January 12, 1901, an order was made and signed by Charles B. Bellinger, United States District Judge for the District of Oregon, extending the time for filing the record on appeal in said cause, in the United States Circuit Court of Appeals for the Ninth Circuit, twenty days.

E. D. McKEE,

Clerk United States District Court, District of Oregon.

Citation.

United States of America, } ss.
District of Oregon. }

To J. D. Spreckels & Bro. Company, and to C. W. Fulton, Proctor, Greeting:

Whereas, R. D. Hume, claimant of the schooner "Berwick," has lately appealed to the United States Circuit

Court of Appeals for the Ninth Circuit, from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law; you are, therefore, hereby cited and admonished to be and appear before said Circuit Court of Appeals at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this December 27, 1900.

CHARLES B. BELLINGER,
District Judge.

Due service of this notice of appeal is admitted at Astoria, Oregon, this 31st day of December, 1900.

C. W. FULTON,
Proctor for Libelant.

[Endorsed]: United States District Court, District of Oregon. J. D. Spreckels & Bros. Co. vs. The Schooner "Berwick." Citation on Appeal. Filed January 8, 1901. E. D. McKee, Clerk United States District Court.

In the District Court of the United States for the District of Oregon.

July Term, 1898.

Be it remembered, that on the 20th day of October, 1898, there was duly filed in the District Court of the United States for the District of Oregon, a libel, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

Libel.

To the Honorable C. B. BELLINGER, Judge of the District Court of the United States for the District of Oregon.

The libel of the J. D. Spreckels Bros. Co., a corporation organized and existing under the laws of the State of California, owner of the tug "Escort," against the schooner "Berwick," whereof ———————— is or lately was master, her tackle, apparel, furniture, and cargo, and against all persons intervening for their interest in the said vessel in a cause of action civil and maritime, alleges as follows:

That libelant is, and during all the time herein mentioned was, the owner of the steam tugboat called the "Escort," which said steam tugboat is, and for some time past has been, engaged in the business of towing vessels in and out over the Columbia river bar. That on the 6th day of October, 1898, the said tugboat was moored at a

wharf in the port of Astoria, district of Oregon, and about midnight the employees on the tug saw distress signals being fired at sea. Steam was immediately gotten up on the tugboat and at twenty minutes after 12 o'clock at night the said tugboat left the port of Astoria for sea, crossed the bar and went out about 12 miles to sea where she discovered the schooner "Berwick" loaded with lumber and in a sinking condition, and in tow of a steamer called the steamer "Fulton." The schooner "Berwick" had on the 5th day of October, 1898, crossed out over the Tillamook bar, and in going out had struck on the Tillamook bar and sprung a leak and begun rapidly to take water. Arriving near the Columbia river bar, she was taken in tow by the steamer "Fulton," but said steamer not desiring to enter the port of Astoria with said schooner held her off the bar and fired the signals of distress to attract attention in the port of Astoria, which were the signals observed as aforesaid, and in answer to which the tug "Escort" went to the assistance of the said schooner. That the said "Escort" on arriving at the point where the schooner "Berwick" was, as aforesaid, at the request of the master of the said schooner, took the said schooner in tow, and paid to the steamer "Fulton" the amount demanded by it for the services it had performed, namely, $100.00, and thereupon the said "Escort" towed the said schooner "Berwick" in from the ocean to the port of Astoria, where it arrived with said schooner at 9 A. M., ont he morning of October 6th, 1898.

That the services performed by the said tug "Escort" were reasonably worth the sum of $750.00, and payment

thereof has been demanded, but no part or portion thereof has been paid. That in addition to the said $750 libelants are entitled to $100.00 advanced as aforesaid to steamer "Fulton," making the total sum due the libelants from the schooner "Berwick" and cargo, the sum of $850.00. That the said schooner "Berwick" together with her cargo of lumber, as aforesaid, is now moored at the wharf in the port of Astoria within the district of Oregon.

That all and singular the premises are ture, and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays that process in due form of law and according to the practice of this Court in cases of admiralty and maritime jurisdiction may issue, and said schooner "Berwick," her tackle, apparel, furniture, and cargo, and that all persons claiming any interest therein may be cited to appear and answer the matters aforesaid, and that the schooner, her tackle, cargo, etc., may be condemned and sold to satisfy the claim of libelants aforesaid, with interest thereon from the 6th day of October, 1898, and costs.

C. W. FULTON and
G. C. FULTON,
Attorneys for Libelants.

THE J. D. SPRECKELS & BROS. CO.
By S. B. RANDALL, Agent.

State of Oregon, } ss.
County of Clatsop. }

I, S. B. Randall, being first duly sworn, depose and say that I am the agent of libelant in the above-entitled cause; and that the foregoing libel is true, as I verily believe, and all the material facts stated therein are within my personal knowledge.

Subscribed and sworn to before me this 19th day of October, 1898.

[Seal] C. W. FULTON,
Notary Public for Oregon.

Filed October 20, 1898. E. D. McKee, Clerk.

And afterwards, to wit, on the 6th day of December, 1898, there was duly filed in said Court, an answer in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

IN ADMIRALTY.

Answer.

To the Honorable C. B. BELLINGER, Judge of the District Court of the United States, for the District of Oregon.

The answer of R. D. Hume, of San Francisco, State of California, intervening for his interest as owner of the schooner "Berwick" to the libel of J. D. Spreckels & Bro. Co., a corporation existing under the laws of the State of California, against the schooner "Berwick," her tackle, furniture, apparel, and cargo answers and alleges as follows:

I.

That as to whether or not during all the times mentioned in said libel or any time the libelant was a corporation as in said libel alleged, or was the owner of the steam tugboat called the "Escort"; or whether on the 6th day of October, 1898, said tugboat was moored at a wharf in the port of Astoria, or whether at about midnight or at all the employees of the tug saw signals of distress fired at sea; or as to whether or not steam was immediately gotten up on the tug, or whether at twenty minutes after twelve o'clock at night said tug left the port of Astoria for sea, this respondent is ignorant, and he has no personal knowledge or belief concerning the same.

And this respondent denies that said tug there or else-

where discovered the schooner "Berwick" in a sinking condition.

Respondent denies that the schooner "Berwick" had on the 5th day of October, 1898, crossed out over Tillamook bar, or had begun rapidly taking water, or that upon arriving near the Columbia river bar she was taken in tow by the steamer "Fulton." As to whether or not the steamer "Fulton" not desiring to enter the port of Astoria with the schooner "Berwick," held her off the bar and fired signals of distress, attracting attention in the port of Astoria; or as to whether or not the said tug "Escort" paid to the steamer "Fulton" the amount demanded by it for the services it had performed, to wit, $100, or any sum, this respondent is ignorant, and has no personal knowledge concerning the same.

Respondent denies that the said tug "Escort" took the said schooner "Berwick" into tow at the request of the master of said schooner, and avers that the facts in relation to the towing of said schooner by the tug "Escort" are not fully set forth in said libel, and that the truth in relation thereto is as hereinafter and in article III herein alleged.

II.

Respondent denies that the service performed by the said tug "Escort" were reasonably worth the sum of $750, or any other or greater sum than $100; and denies that in addition to said sum of $750 or any sum libelant is entitled to $100, advanced to the steamer "Fulton"; and denies that there is due libelant from the schooner "Berwick" or her cargo the sum of $850, or any sum.

III.

That on the 4th day of October, 1898, the said schooner "Berwick," in charge of Cornelius Anderson, master, left the port of Nehalem, Oregon, in tow of the steamer "Maggie," having on board a cargo of lumber and bound for the port of San Francisco, State of California, the said schooner being in every respect staunch and fit for sea and the voyage she was about to undertake. That while being towed over the Nehalem bar the schooner struck, and shortly afterward the hawser of said steamer "Maggie" was let go, and the schooner proceeded to sea without said steamer. That about twenty minutes afterward it was discovered that said schooner had sprung a leak; that the weather was calm, with a strong current running from the south, and at five o'clock A. M. said schooner was outside of the Columbia bar, where she lay until about 5:30 o'clock P. M. of said day, when the steamer "Fulton" came alongside and offered to tow said schooner to Astoria that evening for the sum of $250, which, being thought exorbitant by the master of said schooner, was refused, and the sum of $100 was offered by the master of the "Berwick," which was refused by the master of the"Fulton," who then proposed to leave the compensation to be paid for such towage service to be adjusted between the owners of the respective vessels, upon the basis of a reasonable compensation. That the proposal of the master of the "Fulton" was accepted, and the said Cornelius Anderson, master of said schooner "Berwick," duly made and entered into an agreement with the master of said steamer "Fulton," under which

said steamer "Fulton" was for a reasonable compensation to be paid her owners, to tow said schooner "Berwick" to the port of Astoria, and thereupon said steamer "Fulton" immediately passed her hawser to the "Berwick" and entered upon the fulfilment of the said contract to tow said schooner to the port of Astoria. That the "Fulton" towed the "Berwick" until about nine o'clock P. M., when the captain of the "Fulton" ordered the sails of the "Berwick" to be taken down, and told the master of the "Berwick" he would lay by until daylight. That at 4:15 o'clock on the morning of October 6, 1898, the tug "Escort" hove in sight and came alongside. The master of the "Fulton" ordered his hawser let go and the "Escort"passed her hawser to the "Berwick" and towed her to port, where she arrived at eight o'clock on the morning of October 6.

And this respondent avers that the towage service so performed by the tug "Escort," and whatever service was rendered by said tug or libelant was so performed and rendered at the request, for the benefit of, and for said steamer "Fulton," and in pursuance of an understanding and arrangement between the master of the steamer "Fulton" and the agent and owners of said tug "Escort," and in fulfillment of the towage contract entered into with said steamer "Fulton," and hereinbefore alleged, and not at the instance, request, or desire of said schooner "Berwick" or her owner. That at the time when the service of said tug "Escort" was so as aforesaid tendered to said steamer "Fulton," the said schooner "Berwick" was not in distress or danger, but at the time

had a good towline fast to said steamer "Fulton," which was then and there staunch and strong and in every way capable and able to tow said schooner into port in accordance with the terms of the contract therefor, hereinbefore alleged.

IV.

That all and singular the premises are true.

Wherefore, this respondent prays that this Honorable Court may be pleased to pronounce against the libel aforesaid, and condemn the libelant in costs, and otherwise law and justice administer in the premises.

DOLPH, MALLORY & SIMON,
Proctors for Claimant.

JNO. M. GEARIN,
Of Counsel.

District of California—ss.

I, R. D. Hume, being first duly sworn, depose and say that I am respondent in the above-entitled cause, and that the foregoing answer is true, as I verily believe.

R. D. HUME.

Subscribed and sworn to before me this 1st day of December, 1898.

[Seal] JAMES L. KING,
Notary Public for California.

District of Oregon—ss.

Due service of the within answer, by the delivery of a duly certified copy thereof, as provided by law, at Portland, Oregon, on this 5th day of December, 1898, is hereby admitted.

C. W. FULTON
Of Proctors for Libelant.

Filed December 6, 1898. E. D. McKee, Clerk.

And afterward, to wit, on the 22d day of November, 1900, there was duly filed in said court, findings of the court, in words and figures as follows, to wit:

In the District Court of the United States, for the District of Oregon.

J. D. SPRECKELS & BROS. CO., Libelant,
vs.
The "BERWICK," Her Tackle, etc., Respondent.
R. D. HUME, Claimant.

No. 4,371. November 22, 1900.

Findings.

The above-entitled cause came regularly on for hearing on the pleadings and proofs submitted by the respective parties, the libelant appearing by Mr. C. W. Fulton, its attorney, and the respondent and claimant by Mr. John M. Gearin, their attorney, and the Court, having heard the proofs and arguments, and being now fully advised in the premises, finds the following facts and conclusions of law:

I.

That libelant is a corporation organized and existing under the laws of the State of California, and was such corporation during all the time in the libel mentioned, and was, during the said time, the owner of the steam tug called the "Escort."

II.

That on the 6th day of October, 1898, said tugboat was moored at a wharf in the port of Astoria, in this district, and about midnight the master of the tug, who was then in bed at his dwelling-house in Astoria aforesaid, was awakened by a telephone call and notified that rockets and signals of distress were being fired out at sea, and thereupon said master got his crew together and got up steam on the said tugboat and proceeded out to sea to ascertain what was wanting. At a distance of about ten miles off the Columbia river, being about thirty miles from Astoria, he found the respondent, loaded with about 138,000 feet of lumber, leaking badly, but in tow of the steam schooner "Fulton."

III.

Said respondent the schooner "Berwick," on the 5th day of October, 1898, in tow of a tug, had crossed out from the Nehalem river, loaded as aforesaid, and bound for San Francisco, California. In passing out said schooner struck heavily on a bar at the mouth of the Nehalem river and sprung a leak. The leak was not discovered until the tug had let go of the schooner and started back into the Nehalem river, when a signal of distress was hoisted, but it failed to attract the attention of the tug, but did attract the attention of the steam schooner "Fulton," then on its way to San Francisco.

The "Fulton" spoke to the schooner, and the master of the schooner asked to be towed into the Columbia river, which the master of the "Fulton" offered to do for

$250.00, but the master of the "Berwick" declined, and offered $100.00 for the service. The master of the "Fulton" declined that offer, but proposed to tow the "Berwick" into the Columbia and leave the price to be settled by the owners of the "Fulton" and the "Berwick," and that proposition was accepted and the "Fulton" took hold of the "Berwick" and started in with her, arriving at the mouth of the Columbia after dark, but it was very clear, the moon was shining brightly, and objects could be plainly seen on the water. The "Fulton" started in with her tow, but the "Berwick" was well filled with water and was very low in the water and towed badly, and the "Fulton" did not have sufficient power to handle her properly, and she drifted out of the channel, and thereupon the master of the "Fulton," fearing the tow would go ashore, turned and went out to sea and anchored where they were found by the tug "Escort," as aforesaid.

IV.

The "Escort" having arrived as aforesaid, the master of the "Fulton" proposed that he should be paid $100.00 for the services thus far of the "Fulton," and that the "Escort" should tow the "Berwick" into Astoria, and the master of the "Escort" paid the "Fulton" $100.00, and took the "Berwick" in tow and towed her safely to a dock in Astoria where her cargo was discharged and her damages repaired.

V.

That said schooner "Berwick" was of the value of $5.000.00.

VI.

That the "Berwick" was so badly injured that she could not have lived at sea, nor could she have gotten into port without the aid of the "Escort," and the services performed by the "Escort" were salvage services.

VII.

That the sum of five hundred dollars is a reasonable sum to be allowed for the services rendered as aforesaid by the said tug "Escort" to said schooner "Berwick," and libelant is entitled to a decree for that amount against such schooner, her tackle, furniture, etc.

CHARLES B. BELLINGER,
District Judge.

Filed November 22, 1900. E. D. McKee, Clerk.

And afterward, to wit, on Thursday, the 22d day of November, 1900, the same being the 16th judicial day of the regular November term of said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the District Court of the United States, for the District of Oregon.

J. D. SPRECKELS & BROTHERS COMPANY,

Libelant,

vs.

The Schooner "BERWICK," Her Tackle, Furniture, Apparel and Cargo,

Respondent.

R. D. HUME,

Claimant.

No. 4,371. November 22, 1900.

Decree.

This cause having come on to be heard on the pleadings and proofs produced by the respective parties, and having been argued by the respective advocates, and it appearing to the Court that the libelant is entitled to recover for the services alleged in the libel, the sum of five hundred dollars, now on motion of C. W. Fulton, proctor for the libelant, it is ordered, adjudged and decreed that the libelant above named recover against the respondent above named the sum of five hundred dollars,

and costs taxed at the sum of eighty 50-100 dollars, making in all the sum of five hundred and eighty 50-100 dollars, for which sum said schooner, her tackle, furniture and apparel are hereby condemned.

It is further ordered, adjudged and decreed that unless this decree be satisfied, or proceedings thereon be stayed on appeal within twenty days from the date of this decree and in the manner prescribed by rule and practice of this Court, the stipulators, for costs and value on the part of said vessel, cause the engagements of their stipulations to be performed, or show cause within the time prescribed by law why execution should not issue against their goods, chattels and lands to satisfy this decree.

CHARLES B. BELLINGER,

Judge.

Filed November 22, 1900. E. D. McKee, Clerk.

And afterward, to wit, on the 14th day of December, 1900, there was duly filed in said court a bill of exceptions in words and figures as follows, to wit:

In the District Court of the United States, for the District of Oregon.

J. D. SPRECKELS & BROTHERS COMPANY,
Libelant,
vs.
The Schooner "BERWICK," Her Tackle, etc.,
Respondent.
R. D. HUME,
Claimant.

Bill of Exceptions.

The above-entitled cause came regularly on for trial before the above-entitled court on the day of November, A. D. 1900, the libelant appearing by its proctor, Mr. C. W. Fulton, and the claimant by his proctor, Mr. John M. Gearin. And thereupon, to sustain the issues on its behalf the libelant called as a witness—

S. B. RANDELL, who, having been first duly sworn, testified as follows:

"My name is Samuel B. Randell. I am master of a tugboat and a pilot on the Columbia river bar. I have been going to sea over thirty years. I have been en-

gaged as a pilot and as tugboat master on the Columbia river bar something over fifteen years."

"In the month of October, 1898, I was the agent of the libelant. J. D. Spreckels & Bros. Company, owners of the tug 'Escort' and the tug 'Relief,' and as such agent had charge of the said tugs, and on the 6th day of October, 1898, the tug 'Escort' was moored at the wharf in Astoria, in this District, and about twelve o'clock at night, after Captain Howes the master of the tug, and the crew had gone to bed and after I had gone to bed, I was awakened by someone who notified me that signals of distress were being fired off the bar. I immediately got up and went down to the wharf where the tug was, and I found Captain Howes, the master of the tug, had been sent for, and he shortly afterwards came. Steam was gotten up on the tug 'Escort,' and she immediately went out to sea, and some time before noon she returned with the schooner 'Berwick' in tow. They made the schooner 'Berwick' fast to a wharf, and I went on board of her. She was leaking very badly, so much so that they had to keep all of the pumps at work while she was lying at the wharf to keep her from sinking, and at the same time they had to discharge cargo. She was loaded with lumber, and they discharged the cargo of lumber and repaired the vessel.

"The schooner was in such a condition that she could not possibly have lived at sea, nor could she have made any port without the assistance of a tugboat."

"I am acquainted with vessels of that character and

the value thereof, and I should judge the schooner was worth about five thousand dollars."

"In my judgment the services rendered by the 'Escort' to the 'Berwick' were worth two thousand dollars."

R. E. HOWE was then called as a witness on behalf of the libelant, and after being first duly sworn, testified as follows:

"My name is R. E. Howe and my calling is that of master of tug-boats and pilot on the Columbia river bar. I have been engaged in the business of piloting and going as master of tugboats on the Columbia river bar over thirty years."

"In the morning of October, 1898, I was master of the steam tug 'Escort,' which was then owned by the libelant, and I was in the employ of the libelant as master."

"On the 6th day of October, 1898, at night, after I had gone to bed, about twelve o'clock at night, as I remember, a telephone in my house rung me up. I went to the telephone and through the telephone was notified that sky-rockets and signals of distress were being fired off the Columbia river bar. I knew that some ship was in distress and therefore, I immediately got up and dressed and went down and hunted up my crew, all of whom were in bed, got them up and got up steam as quickly as possible and went out over the bar, looking for any vessel which might be in distress. About ten miles off the bar and out to sea, I found the schooner 'Berwick' with the steam schooner 'Fulton' laying alongside of her. I went up to the steam schooner 'Fulton' and the master came out. I asked him what was the matter.

He told me that he had picked the 'Berwick' up in a leaking condition and that they wanted him to take her in but that he could not do it very well, and wanted me to take the schooner, but he said he had been laying alongside of her several hours and he thought his boat should be paid something for the services it had rendered. He thought he ought to have $200, but finally he proposed to take $100, and I finally told him I would pay him the one hundred dollars, so I gave him a check on J. D. Spreckels & Brothers Company for that amount, and I then went to the schooner 'Berwick' and gave her a line and made fast to her and towed her into the Port of Astoria, and took her alongside of a wharf in Astoria and made her fast there. She was leaking very badly, and could not possibly have lived but a very short time at sea, nor could she have sailed into the Columbia river, as the wind was blowing off shore."

"I am acquainted with vessels of that character and the value of them, and in my judgment, the 'Berwick' was worth about five thousand dollars, and I think the services performed were worth from fifteen hundred and two thousand dollars. Nothing was ever paid us for doing the work."

"The ordinary price for towing lumber ships when they are loaded is fifty cents per thousand feet of the lumber on board."

"It is not true that the captain of the 'Fulton' told me that he had a contract or had agreed to tow the schooner in for $250, but he told me he had no contract whatever with her and had made no agreement about it."

"It is not true that he told me he had offered to do it for $250, or for any sum whatever, he never made any such statement to me."

Thereupon it was admitted by the proctors for the respective parties and stipulated in open court that the libelant is and was a corporation as alleged in the libel, and is and was the owner of the steam tugboat "Escort" as alleged in the libel.

Whereupon the libelant rested its case.

Thereupon the claimant introduced and read in evidence the testimony of Cornelius Anderson, H. C. Anderson, R. D. Hume, Peter Rintoul and J. B. McIntyre taken under commission heretofore issued out of this court, which commission and testimony is as follows, to wit:

In the District Court of the United States, for the District of Oregon.

Commission.

The President of the United States of America, to L. S. B. Sawyer, San Francisco, California, Greeting:

Know ye, that we, in confidence of your wisdom, prudence and fidelity, have appointed you a Commissioner, and by these presents do give you full power and authority diligently to examine such witnesses as each or either of the parties hereto may produce before you, upon oath or affirmation before you to be taken, and upon such interrogatories and cross-interrogatories as may be propounded to such witnesses at the time of taking their said testimony as witnesses in a certain cause

now pending and undetermined in the District Court of the United States for the District of Oregon, wherein J. D. Spreckels & Bro. Company is libelant of the schooner "Berwick," and R. D. Hume is claimant of said schooner; said testimony to be taken at your office, No. 508 California street, San Francisco, California, at such time as may suit your convenience and the convenience of the parties hereto; and we do hereby require you, before whom such testimony may be taken, to reduce the same to writing, and cause it to be subscribed by each of said witnesses in your presence, and to close it up under your hand and seal, directed to the clerk of the above-entitled court, at Portland, in the District of Oregon; as soon as may be after the execution of this commission; and that you return the same, when executed as above directed, with the title of the cause endorsed on the envelope of the commission.

Witness, the Honorable CHARLES B. BELLINGER, Judge of said District Court, and the seal of said Court affixed at Portland, in said District, this 28th day of December, A. D. 1898.

[Seal District Court]

E. D. McKEE,
Clerk.
By G. H. Marsh,
Deputy Clerk.

In the District Court of the United States, in and for the District of Oregon.

IN ADMIRALTY.

J. D. SPRECKELS & BRO. COMPANY,
Libelant,

vs.

Schooner "BERWICK."

R. D. HUME,
Claimant,

Caption to Depositions.

Be it remembered that on Wednesday, the eighth day of March, in the year one thousand eight hundred and ninety-nine, at my office, room 36, No. 508 California street, in the city and county of San Francisco, State and Northern District of California, personally appeared before me, L. S. B. Sawyer, Commissioner duly appointed by the said Court, Cornelius Anderson, H. C. Anderson, and R. D. Hume, witnesses on the part of the claimant in the above-entitled cause and matter, R. H. Countryman, Esq., appearing for Messrs. Dolph, Mallory & Simon, atorneys for said claimant, and Nathan H. Frank, Esq., appearing for Messrs. Fulton Brothers of Astoria, Oregon attorneys for the said libelants; and the said witnesses, being by me first severally sworn and cautioned to testify the truth, the whole truth, and nothing but the truth, did thereupon depose and say as is hereinafter fully set forth.

It is hereby stipulated and agreed by and between the counsel for the respective parties, that the testimony of such witnesses as may be produced by either party to the within-entitled cause before L. S. B. Sawyer, Esq., commissioner, shall be stenographically and put into typewriting by Ernest J. Mott, a skillful stenographer and typewriter, and thereafter read over and signed by the witnesses respectively.

At the request of counsel representing the libelant, all witnesses except the one upon the stand were excluded during the taking of the depositions.

CORNELIUS ANDERSON, a witness produced on the part of the claimant, having been duly sworn, testified as follows:

Mr. COUNTRYMAN.—Q. Captain, will you please give your name, age, residence, and occupation?

A. My name is Cornelius Anderson. I was born in 1847.

Q. Where? A. In Norway.

Q. Where do you reside? A. In Berkeley.

Q. California? A. Yes, sir.

Q. And your occupation is what?

A. Master of the schooner "Berwick," or, generally speaking, master mariner.

Q. How long have you been such master mariner?

A. Well, that I could say truthfully, fourteen years.

Q. What has been your general occupation in life?

A. Going to sea.

Q. For how many years have you gone to sea?

A. Since I was fourteen years old.

Q. That has been your occupation continuously since you were fourteen years old, has it?

A. Since I was fourteen?

Q. Yes.

A. Oh, well, I have been before the mast, and been mate, and master, etc.

Q. You did not understand me. During all the years from the time you were fourteen years of age, you have followed the sea as an occupation? A. Yes, sir.

Q. Were you ever master of the schooner "Berwick"?

A. Yes, sir.

Q. When? A. I started in in April, 1898.

Q. You are still the master of the "Berwick"?

A. I was her master at the time this occurred.

Q. You are her master now, I mean.

A. I was her master then, and am now.

Q. Will you tell us the condition of that schooner on or about the 4th day of October, 1898, as to its being seaworthy, and what kind of a schooner it was?

A. She was in number one condition, because we had just come from the ship yard.

Q. How long before? A. Three weeks before.

Q. And where was the ship yard from which you had just come? A. In Alameda.

Q. Alameda, California? A. Yes, sir.

Q. You made a trip from Alameda to Nehalem river?

A. Yes, sir. Let me see about that, now. I am going too fast. We did not just exactly come off the ways

at the time, but I came from the creek at that time. I had made two trips up the Coast before that, since the time we had left the ways. But she was in staunch and good condition, just the same as when she had come off the ways.

Q. When you speak of coming from the creek, you mean from Oakland creek? A. Yes, sir.

Q. About how long had it been since the schooner was on the ways, when you were in the Nehalem river in October, 1898?

A. That was about three months and a half.

Q. You say the schooner was in first-class condition?

A. The schooner was in first-class condition.

Q. She was staunch and strong, was she?

A. Yes, sir. She was staunch and tight in every way Rigging, masts, and everything was in good shape.

Q. About the 4th day of October, 1898, what did you attempt to do with the vessel, if anything?

A. Well, we got orders from the towboat to tow out, and we towed out—

Mr. COUNTRYMAN.—(Interrupting.) I do not want to lead the witness in this matter, unless Mr. Frank will make no objection to it.

Mr. FRANK.—Just get along with the preliminaries as fast as you can.

Mr. COUNTRYMAN.—Q. On the 4th day of October, 1898, you were in the Nehalem river, loaded and ready to sail for San Francisco, were you? A. Yes, sir.

Q. How was your cargo stowed?

A. It was stowed in number one shape.

Q. What was the cargo? A. Lumber.

Q. Everything was well secured?

A. Everything was in good shape, yes, sir.

Q. Your vessel was well masted, and victualed and manned? A. Yes, sir.

Q. And everything properly appareled and painted?

A. Yes, sir.

Q. On the 4th day of October, 1898, did you or not leave the Nehalem river?

A. Yes, sir, I left the Nehalem river on that day.

Q. How did you leave it? How did you get out of the river? A. We were towed out of the river.

Q. Who towed you out?

A. The towboat "Maggie," I think—yes, the towboat "Maggie."

Q. What, if anything, happened in that towage?

A. There was nothing else happened than the striking, at the time we were towing.

Q. Nothing else but the striking—where did you strike? A. By all appearances, on the south spit.

Q. The south spit at the mouth of the Nehalem river?

A. Yes, sir.

Q. What did the towboat do?

A. He kept on towing.

Q. He kept on towing, and you crossed over the spit?

A. Crossed over the spit, yes, sir.

Q. He pulled you off, did he? A. Oh, yes.

Q. How was your vessel? Was she under sail?

A. We were under sail, yes, sir.

Q. What kind of a breeze did you have?

A. We had a moderate breeze from the south southeast.

Q. Were all your sails set?

A. All my sails were set.

Q. When you struck on the spit, what did you do? Did you signal or say anything to the tugboat?

A. No, sir. There was nothing to be said. I could not say anything, right there in the breakers.

Q. Did you make any signal?

A. No, sir, I did not make any signal. There was no time to do anything.

Q. What did the tugboat do? Did it let go its hawser, or anything?

A. No, sir. Probably one or two minutes after we struck, the towboat cut off to one side.

Q. Was she cutting off to haul you over the spit, or to haul back into the channel?

A. To get me back into the channel again, sir.

Q. After hauling you off, did the towboat signal you to let go the hawser?

A. Not until we had towed probably another five or ten minutes.

Q. How far were you at sea then?

A. Then we were pretty close on the buoy, which lies probably a quarter of a mile off the breakers.

Q. The tugboat signaled you to—

A. (Interrupting.) To let go the hawser.

Q. You did let it go, did you? A. Yes, sir.

Q. What was the condition of your vessel at that time?

A. I tried the pumps even before the towboat let go, but we could not get the water out with the pumps—the pumps then had not been used for the last fourteen days, and we could not get any water out of the vessel. I told one of the men to go down and try the pumps, but we could not get water out of the pumps. Then we didn't try again until probably ten minutes after he let go his hawser. Then we got water, but we did not to an extent that amounted to anything. I thought probably it might be water that settled on the side when the vessel would lean over, the way that it would naturally do sometimes.

Q. When did you find that you were getting considerable water in the vessel, to show that she was leaking, if she was leaking?

A. When I found that I didn't get any suck, I said to the mate, "Get the colors, and hoist the flag."

Q. About how long was that after the tugboat let go of you?

A. I suppose probably that was about fifteen or twenty minutes. Then the towboat didn't stop; in fact, I don't think he stopped at all, any more than slowed down a little. Then he went right in. I had up the flag, but he didn't pay any attention to it, or didn't see it, probably.

Q. He went back into the Nehalem river?

A. He went back home, yes, sir.

Q. Where were you bound for when you left Nehalem?

A. We were bound for San Francisco.

Q. What was the current outside the mouth of the river? In which direction was it running?

A. On the coast, with the light wind we had, the current was going to the northward.

Q. What did you do then?

A. We had a southerly wind, and, of course, I went below to find out if the water was gaining—I finally went down forward to see, and I could see that the vessel was making water, and I concluded then, the wind being then from the southward, that I would run for Astoria.

Q. How far were you from the mouth of the Columbia river at this time?

A. About thirty-five miles.

Q. About what time of day was it?

A. This was about two o'clock in the afternoon, I imagine. We left the Nehalem Mill about twelve o'clock.

Q. And about how fast did the vessel ordinarily sail?

A. Well, that depends upon the wind, as a rule. The fastest speed I ever got her up to at any time was eight miles an hour.

Q. What kind of a wind did you have at that time?

A. We had a south southeast wind—that is, to start in with at about eight o'clock that night—

Q. Was it a moderate wind?

A. Oh, yes; a very moderate wind.

Q. Then you reached the Columbia river bar at what time?

A. We were off the Columbia river, just about abreast the Columbia river bar, at seven o'clock the following morning.

Q. And you had been sailing that entire night, had you, or drifting? A. We had been partly sailing.

Q. How was the wind during the night?

A. About ten o'clock that night the wind stood to the northeast, and very light. That is the reason that we made such slow progress, although I suppose it would have taken us a few hours to get down there.

Q. What was the condition of the schooner when you were off the Columbia river bar?

A. By all appearances the schooner was all right, as far as it went.

Q. How was the water? Was it gaining on you, or not?

A. No, sir. We just kept her about the same way.

Q. Could you not have sailed into the Columbia river yourself?

A. Yes, sir. That is what we were doing. All that day of the 5th, we had calm; we could not sail because we had nothing to sail with. At about four o'clock in the afternoon, a northwest breeze sprung up, when we started to sail, and we had a very good breeze, which I think would have brought us in if we had kept on sailing.

Q. Did you stop sailing?

A. We stopped sailing when I got sight of the steamer "Fulton."

Q. What is the "Fulton"?

A. The "Fulton" is what they call a steam schooner.

Q. Where was she coming from? Do you know?

A. I understand she came from Gray's Harbor; I think from the northward.

Q. She saw your flag, did she, and came over to you?

A. I was standing at the time on the port tack, stand-

ing in for the Columbia river bar, when she came along, and when I came in his direction, or as I came in line with him, I hauled down the flying jib and hove the vessel back the other way until he came back to where I was. He was still to the northerly of me. He came up alongside and asked me what I wanted. I asked him if he would be kind enough to report me in San Francisco when he got there.

Q. To report you as being leaking?

A. I told him if he had time, if he would be kind enough to go up to R. D. Hume & Company, No. 421 Market street, and tell them that I went into Astoria; that I had struck on the Nehalem river bar, and that I was leaking a little, and wanted to go in there, and probably get some more help to go home.

Q. What did he say?

A. The captain says like this: "This is a funny idea, that you stop a man and have an idea that he is going to report you in San Francisco." So I excused myself, and said I was very sorry, but I hoped he would not take it very hard, and he said, "All right." But he said, "Don't you want to get towed into Astoria?" "Yes," says I, "I figure on getting towed if I can't sail." That was the expression. "Well," he said, "what do you say if I tow you in?" So I said to him, "What will you ask me to tow me up to Astoria?" He said, "I will tow you there for $250 to-night." I says to him, "No, that is too much, Captain. But I will tell you what I will do. I will give you a hundred dollars," which I considered was a

very fair price. He finally left me. He didn't give any answer, but he finally rings his bells and goes ahead, and goes on, as I thought, for San Francisco. I expected that was the last of him. He finally made another turn and came around again, and he said, "Who is your owners?" He asked me that again, though I had told him at first, but he probably didn't remember that. He said, "Who is your owners?" And says I, "R. D. Hume & Company." Says he, "I will tell you what I will do. We will leave the bargain for your and my owners to settle when we get down to the city. How is that?" Says I, "That's all right. Go ahead." He asked me if I had a hawser, and I told him no. Says he, "All right. I will give you one," and he gave me his hawser. Then he started in to tow me.

Q. What happened next?

A. He kept on towing me until about eight o'clock, when he eased up. He finally started to make a turn, and by and by he stopped altogether. I didn't know what to think of it, and finally, the first thing I knew, he ordered me to haul down my foresail and jib; those were the sails I had on at the time. I hauled them down. At the same time he tells me to haul down my sails, he says, "Haul down your sails, Captain. We will lay here until daylight." Says I, "All right." I hauled down the sails, and finally we were laying about and about there, in all kinds of directions. Sometimes he would go ahead and naturally he had to keep good headway on his boat in order to keep his hawser out of his wheel. Sometimes he would go too far ahead, and then he would take a turn,

and come out a little further, and go back, and so forth, and he was crossing about among the buoys. We had several of the buoys in sight there all through the night. I think it was about twenty minutes past four in the morning when I saw a headlight coming down the stream, and the first thing I knew, I saw it was a towboat. He goes alongside of the "Fulton"—

Q. (Interrupting.) That is, the tugboat does?

A. The towboat, the "Escort No. 2," I found it to be afterwards—of course I could not see what the name was then, but I could tell that it was a towboat. He goes alongside of the "Fulton," and he stays there quite a long time. By and by the towboat goes off. It looked to me when he started off as if he was going up the stream towards Astoria. That was the way he looked to me. I said to the mate, "I don't know what that fellow wanted." By and by he stopped, and the "Fulton" started to go ahead for a little spell, and finally the "Fulton" stopped, and he took a turn (the "Fulton" did) with me. Finally the "Fulton" pulls up again, and the "Fulton" blows three whistles, and the towboat comes along side of him again, and whatever they did or what transaction took place, I don't know. But after he called on the "Fulton" again the second time, the towboat left the "Fulton" and went behind my stern, and came up on my port side, and he said to me, "Let go the steam schooner's hawser." I said "Is that so?" The mate was standing there—in fact, the mate and the cook were standing on the deck. I said to the mate, "Go forward and ask the captain of the "Fulton" if we are going

to let go his hawser and take that towboat's." So he went forward (I had the wheel myself, and I could not go), and he hollered to the captain of the "Fulton" and asked him if we were to let go his hawser, and the captain of the "Fulton" says, "Yes, let go my hawser, and take the towboat's." So we did. As soon as we had let go of the "Fulton's" hawser, the captain sings out, "You don't owe me anything."

Q. The captain of what?

A. The captain of the "Fulton." He says, "You don't owe me anything."

Q. What did you say?

A. Well, for a moment I didn't say anything—in fact, it would hardly have been of any use, because he had one of those speaking trumpets. Just for an instant I didn't understand the idea of it, that he would say any such thing, and I didn't make any reply of any kind to him.

Q. Could you have made a reply?

A. He could not have heard what I would have said, because he was then outside of me, and I could merely hear him, and that was all.

Q. The wind was blowing towards you?

A. Yes, sir.

Q. Proceed with your answer.

A. And the towboat, of course, starts in to tow us, and arrived at Astoria at 8 o'clock in the morning. There was some ships lying there, and I remember their striking eight bells at that time in the morning. I don't remember of taking my time exactly, but that I remember, that the ships were striking eight bells at the time.

Q. And you tied up to the wharf?

A. We tied up to Kinney's wharf there.

Q. Go on, Captain, and tell us the rest of the story.

A. Then I wired Mr. Hume—

Q. (Interrupting.) I do not care about those things, Captain. They are not admissible as evidence. Why did you not pay, or offer to pay, the captain of the "Fulton" $250, when he demanded that from you?

A. Why didn't I do it?

Q. Yes. Did you have any reason for not paying him that?

A. Yes, sir. It was extortionate. That is all.

Q. Did you have any conversation with the tugboat, or with any one in connection with the tugboat, with reference to towing you in?

A. I had no conversation with the towboat man whatever. The only expression of any kind that he made towards me out there was when he came up on my bow, he hollered and says, "Are you full of water?" Well, I answered him very bluntly. I says, "No," which is an expression that I very seldom make use of to a gentleman, but I thought it was absurd for him to have an idea that I was full of water; I could not see the idea of it.

Q. That is the only expression that you made use of to him?

A. I told him nothing, and that is the only expression he made use of to me, of any kind.

Q. That is the only conversation you had with the captain of the towboat? A. Yes, sir.

Q. All your arrangements were made with the captain of the "Fulton," and no arrangements were made by you with the towboat? A. That is it.

Q. And any arrangement that was made with the captain of the towboat was made as the result of a conversation between the "Fulton" and the towboat?

Mr. FRANK.—I object to that. He does not know anything about it.

A. It must have been, as far as I know.

Mr. COUNTRYMAN.—Q. So far as your knowledge goes, that was all the arrangement that was made?

A. That is all. I don't know of anything else.

Q. Could you have gotten into Astoria without the aid of towage at that time?

A. I have an idea that I would have got in that night, but of course I did not care, as long as the man offered himself, to take any chances of the kind, although I had a very fine breeze at the time.

Q. In other words, rather than take any chances, you would pay $100? A. Yes, sir. That is the idea.

Q. But you would not pay him $250?

A. I would not pay him any such thing, no.

Q. You would take the chances rather than pay $250?

A. Yes, sir.

Q. You have been traveling up and down the coast for some years, have you, Captain?

A. Yes, sir. I have been traveling up and down the coast for the last eighteen years.

Q. Do you know what is the ordinary and reasonable

price for towing a man in and out of a harbor along the coast?

Mr. FRANK.—That is objected to as incompetent, irrelevant, and immaterial. This is a claim for salvage, I believe.

Mr. COUNTRYMAN.—I will withdraw the question, and ask another.

Q. Have you gone in and out of the different harbors on the coast during that time, during the eighteen years of which you speak?

A. Yes, sir. I have gone out of and into almost all the bar harbors on the coast. In fact, I believe into all of them, with the exception of one. I have not been in at Tillamook. I believe that is the only place I have not been in.

Q. Have you, during that period of time, become acquainted with the price of towage into and out of the different harbors along the coast? A. Yes sir.

Q. Will you tell us what is the reasonable price of towage into and out of the different harbors on the coast?

Mr. FRANK.—I object to that as incompetent and immaterial, and upon the further ground that it has no relation to the reasonable value of this tow.

A. Prices, of course, vary, and they vary in different years. When I first came on the coast, with a harbor like Humboldt, for instance, it was up as high as 80 cents a thousand, I believe, for towage.

Mr. COUNTRYMAN.—Q. What is it now?

A. At the present time, at the majority of the bar harbors, they are paying four bits a thousand.

Q. Do you know what towage is on the Columbia river? A. They tell me four bits.

Mr. FRANK.—I move to strike out the answer, first because it is incompetent and immaterial, and second, because it is hearsay.

Mr. COUNTRYMAN.—Q. When you say they tell you, how do you derive that information? From what source? Is it from the general conversation that you have had with men in the same line of business?

A. You can find out from the parties that are paying for towage, lumber men; from lumber firms and lumber yards. I have often had conversations with them.

Q. And your information upon the subject has been gained in the course of your business as a mariner?

A. Yes, sir. That is the idea.

Q. How heavily were you laden at the time you were going into the Columbia river?

A. How heavily were we loaded?

Q. Yes. How much did you have on?

A. We had about 138,000 feet of lumber, I believe it was.

Q. When you went into Astoria, did you make any protest?

A. Yes, sir, I made a protest that same afternoon.

Q. I show you a protest, and ask you if that is the paper to which you now refer.

A. (After examination.) Yes, that is the one.

Mr. COUNTRYMAN.—We offer this paper in evidence, and ask that it be marked Claimant's Exhibit No. 1, and attached to and made part of the deposition of the witness.

Mr. FRANK.—We object to it, on the grounds, first, that it is not a protest, but only a note of protest, and second, that protest is not evidence of anything in favor of the party making it; and further, that it is incompetent, irrelevant, and immaterial.

(The paper offered was here marked by the Examiner, Claimant's Exhibit No. 1, and is hereto attached and made part hereof.)

Mr. COUNTRYMAN.—Q. Captain, after making this note of protest, did you wire to your owners?

A. Yes, sir.

Q. Was anything said to you about extending the protest?

Mr. FRANK.—That is objected to as incompetent, irrelevant, and immaterial.

A. Yes, sir.

Mr. COUNTRYMAN.—Q. Did you extend the protest?

A. Yes, sir.

Q. I show you a document, and ask you if that is the extension of protest?

A. (After examination.) Yes, sir, that is the one.

Mr. COUNTRYMAN.—We offer this paper in evidence, and ask that it be marked Claimant's Exhibit No. 2, and attached to and made a made of the deposition of the witness.

Mr. FRANK.—We object to it upon the ground that it is irrelevant and immaterial.

(The paper offered was here marked by the Examiner Claimant's Exhibit No. 2, and is hereto attached and made part hereof.)

Mr. COUNTRYMAN.—Q. As I understand you, Captain, you never did make any arrangement, or enter into any contract or agreement of any kind, with the tugboat?

A. No, sir, nothing of the kind.

Q. The only contract you ever had for towage of your vessel was with the "Fulton"?

A. Yes, sir, that is all.

Cross-Examination.

Mr. FRANK.—Q. Captain, how long were you on the bar of the Nehalem river?

A. How long was I on the bar?

Q. Yes. A. Going out?

Q. Yes.

A. That I could hardly estimate. You mean at the time we were striking?

Q. Yes.

A. Well, that could not have been over—the whole striking could not have taken at the very most more than three seconds.

Q. You do not mean to say that the tugboat got you off in three seconds after you struck?

A. It is just like this: She struck first forward like this, and as soon as the wave came past she struck back aft, and that was all.

Q. She struck both ends once?

A. No, sir, not at once.

Q. I did not say "at once"—I say, she struck once at each end?

A. First forward and then aft. Of course, the time that it took the wave to raise the vessel, and for her to come down again aft, that is all the time there was to it. Of course, she never stopped.

Q. By the time the next wave came along, you were off the spit? A. Oh, yes.

Q. How was the weather at that time?

A. Nice weather.

Q. There is always a heavy swell coming in over that bar, is there not? A. No, not always.

Q. There was at this time?

A. Well, there was quite a little swell on.

Q. I notice in this extended protest that you say you found two heavy streams coming in in the fore peak. Is that the fact?

A. Oh, yes. You could see, some coming in on both sides.

Q. How much water did you have in when you arrived off the Columbia bar? A. I could not say.

Q. Did you sound it? A. I could not sound it.

Q. Why could you not sound it?

A. We have no particular way of sounding it. The only way I could see there would be that if it had extended above the skin of the vessel, I could have seen it in the fore peak. If the water had been above the skin, I could have discovered it forward.

Q. How is your vessel trimmed—aft?

A. No, sir, on an even keel. She has got to be on an even keel, in order to handle her right.

Q. What repairs did you make?

A. Had the garboard streak recaulked?

Q. The whole thing?

A. Along the keel. We treated the whole thing.

Q. On both sides? A. On both sides, yes, sir.

Q. Did you have your flag of distress flying when you arrived off the Columbia river? A. No, sir.

Q. Did you put it up there, then?

A. I had my flag out for the steamer, to call his attention, that is all.

Q. What did you want to call his attention for?

A. I wanted to get him to report me at San Francisco, as I told some time ago.

Q. How far off the bar was that?

A. About thirteen miles to the westward of the whistling buoy of the Columbia river.

Q. I suppose you kept your men at the pumps all the time, both day and night? A. Mostly all the day.

Q. How many men did you have aboard?

A. I had two men and myself.

Q. You called at Astoria, then, as a port of distress, did you not? A. Oh, no.

Q. You were not bound for Astoria?

A. I was not bound there. I went in there on account of getting the vessel's leaking looked after. I did not know what might happen on the way down, and I would not take any chances on going down on account of the

vessel leaking. I didn't know what might take place, so I thought I would go into Astoria, and do what I could do there. Of course, I did not fancy it would be good policy to go on to San Francisco like that.

Q. Who was the captain of the tug "Escort"? Do you know?—at the time she picked you up, I mean.

A. I heard his name, but I have forgotten it.

Q. Was it Randall? A. No, sir.

Q. Was it Howes?

A. That is the idea; Howes.

Q. What time in the morning did the "Escort" pick you up?

A. Shortly after 4 o'clock. I guess it must have been something like that.

Q. In the morning? A. Yes, sir.

Q. And you got in by 8 o'clock?

A. Yes, sir. It might probably have been half past 4.

Q. You had a full cargo of lumber on board, did you say? A. Yes, sir, a full cargo.

Q. Do you know what the value of it was?

A. No, sir. That I never heard.

Q. How many thousand feet did you have on board?

A. I think some 138,000 feet. I believe that was it.

Q. What was it, redwood or pine? A. Pine.

Q. Do you know what the value of your vessel was at that time?

A. No, sir, that I don't know anything about.

Q. You do not know what the value was?

A. No, sir.

Q. Was the "Berwick" a new vessel?

A. No, sir, she is not new. She was built along in—she is something like ten or eleven years old, I think.

Q. What is her tonnage? A. Ninety-five tons.

Redirect Examination.

Mr. COUNTRYMAN.—Q. Captain, as I understand you, you say you had three men on board?

A. Yes, sir.

Q. Yourself and two men? A. Yes, sir.

Q. Three men all together? A. Yes, sir.

Q. If you had had more men, could you have kept down the water and proceeded to San Francisco without any trouble?

A. Well, I might have done that.

Q. As I understand you, you went into Astoria to get more men? A. That is the idea.

Q. Captain, what is the vessel worth, the schooner "Berwick"? A. What is she worth?

Q. Yes.

Mr. FRANK.—He said a while ago that he did not know.

Mr. COUNTRYMAN.—What do you think the schooner "Berwick" would sell for?

A. That is hard to tell. It would depend upon what kind of shape she was to be sold in. If you were going to sell her at private sale or by auction, it would be different.

Q. Suppose we say at auction, in the open market?

A. At auction?—that is hard to tell. It would depend upon what use the parties would have for a vessel of that kind.

Q. Would she sell for more than $1,000?

A. Oh, she might fetch $2,500.

Q. Do you think she would bring any more than $2,500? A. Under certain conditions, she might.

Q. A man would have to want her to pay $2,500 for her? A. Oh, yes.

Q. I mean, Captain, by a man having to want her, that he would have to think that he really needed a vessel before he would be willing to pay $2,500 for her.

A. That is the idea.

Q. Have you known vessels as good as the schooner "Berwick" to be sold for $1,000?

Mr. FRANK.—We object to that as immaterial. I have known vessels to go for $25.

Mr. COUNTRYMAN.—Q. You may answer the ques- Mr. Anderson.

A. I know a schooner far superior to the "Berwick" sold for $650.

Mr. FRANK.—I move to strike that out as immaterial.

Mr. COUNTRYMAN.—Q. Captain, when you left Nehalem river, you say the weather was nice. What do you mean by that? Was it smooth out at sea?

A. It was nice kind of weather.

Q. There was no storm, or anything of that kind?

A. No, sir, no storm at all.

Q. Nothing more than the regular swell?

A. It was nice weather.

Q. Did you see any rockets fired by the "Fulton"?

A. Not to my knowledge. I never saw any rockets fired there.

Q. If there had been any rockets fired, you would have seen them?

A. Oh, I would be bound to see them.

Q. You were awake that night, were you?

A. Yes, sir.

Q. And you would have seen the rockets if there had been any fired?

A. Yes, sir, I would have seen them all right. I could not help but see them.

Q. You did not request the tugboat master to take you in tow, did you? A. No, sir.

Recross-Examination.

Mr. FRANK.—Q. You took his hawser, however?

A. I was commanded to do that you know. I was under the control of the steamer, and I had to do that, naturally—had to do just what he told me to do. He told me to take my sails down, which of course left me in his control.

Q. If he had told you to turn around and go back to San Francisco, you would have done that too, would you not?

A. That is a thing that of course I should not do under the circumstances, if he had done that. But as it was, of course, I was under his control.

Q. You offered no objections to the "Escort" taking hold of your hawser and towing you in?

A. Not as long as I was told, you know. Of course, I would not have taken his tow, if I had not been told by the man who was towing me to do so.

CORNELIUS ANDERSON.

Subscribed and sworn to before me this 10th day of March, 1899.

L. S. B. SAWYER,
Special Commissioner.

H. C. ANDERSON, a witness produced on the part of the claimant, having been duly sworn, testified as follows:

Mr. COUNTRYMAN.—Q. What is your age, Mr. Anderson? A. I am twenty-four years old.

Q. Where do you live?

A At 2232 Ashby avenue, South Berkeley.

Q. What is your occupation?

A. My occupation at present is locomotive fireman.

Q. Locomotive fireman? A. Yes, sir.

Q. What has been your occupation heretofore?

A. Sailor and mate.

Q. How long were you sailor and mate?

A. About three years.

Q. Were you ever sailor or mate on the schooner "Berwick"? A. I was.

Q. When?

A. Well, I don't know exactly. It was October or September, say around September; I don't know exactly the date. I believe it was the last of September, if I am not mistaken, or the last day of August. It was around the latter part of the month.

Q. And how long did you continue to be the mate of the "Berwick"?

A. Until October—I believe it was October 8th; I don't know the exact date.

Q. Do you remember the trip of the "Berwick" from Nehalem river on its way to San Francisco, about October 4th last? A. I do.

Q. Will you tell us what happened on that trip in going out over the bar, and what you did thereafter?

A. Well, we left the wharf at Nehalem, the mill, and proceeded down the river in tow of a tug, and were going over the bar, and got on to the southern edge of the channel, on the end of the south spit. We are going over there, and we just got about midway over the spit, and we struck. There was breakers there, and we struck the bow first, and then she raised up and we hit the spit with the stern. We got over the bar, and after we got outside the bar, and the tugboat let go our hawser.

Q. About how long were you going over the spit when you struck? About how much time?

A. That I could not say exactly. I did not take any notice of the time.

Q. Was it a short time or a long time?

A. It was a short time.

Q. What did you do after you went over the bar?

A. After the tug let go our hawser, she blew three whistles, "Good-bye," and proceeded over the bar. We had our sails set, and tried to get out to the westward.

Q. Did you discover that the boat was leaking, and if so, when?

A. As soon as the towboat let go of us, the captain ordered us to try the pumps.

Q. Did you find any water?

A. We pumped for about ten or fifteen minutes, and she started to pull water out of the hold, and we didn't get any suck on the pumps.

Q. What happened after that?

A. The captain asked us if we got any suck out of the pumps and we said no. The cook took the pump, and I went below and got the flag; the captain ordered me to go and get the flag and bent it onto the halyards, and hoist it up to the truck of the mast.

Q. What did you do then? Did you continue on your way to San Francisco, or did you go in the other direction?

A. We continued on our course out to the westward, and we found out that we could get no suck in the pumps, and we saw that the tugboat was not making any attempt to turn back; we saw him go up the river, and the captain said, "I guess the best thing we can do is to go to Astoria."

Q. Why did you hoist the flag?

A. Why did we hoist the flag?

Q. Yes. What did you do it for?

A. To attract the attention of the towboat.

Q. Then after the captain said you would go to Astoria, you started for that place?

A. We started for that place right off, yes, sir.

Q. In what direction was the wind?

A. Well, it was a southerly wind. I think it was a

southwest wind, or a south-southwest, or something around that quarter.

Q. How was the current?

A. The current was setting to the northward.

Q. Did you continue to make for the Columbia river?

A. We did.

Q. At what time did you arrive there, if you arrived there at all?

A. We arrived off the Columbia river the next morning, somewhere around 4:30, or something like that; I am not positive about the time, because I did not look.

Q. Did you meet a steamer, or anything, near the mouth of the Columbia river at any time?

A. We met a steamer that afternoon, and we still had our flag flying.

Q. What were you doing during the day preceding that time?

A. We were pumping the vessel.

Q. Just lying outside of the— .

A. (Interrupting.) Lying outside of the harbor. We could not get in on account of the very light winds—a calm, in fact.

Q. So you lay outside until the afternoon?

A. Until the afternoon. Then we sighted a steamer coming down the coast.

Q. What steamer was it?

A. It was the steamer "Fulton."

Q. Do I understand you that you arrived off the Columbia river the next morning after you left the Nehalem river, and that on the afternoon of the day that you ar-

rived off the Columbia river you sighted the steamer "Fulton," or was it the next day after that?

A. It was the same day.

Q. Do you know of any arrangement being made with the captain of the "Fulton" to tow you in?

A. Yes, sir, I do.

Q. Were you present at the time of the arrangement?

A. I was up on deck with the captain; alongside of the captain at the time.

Q. Did you hear the conversation? A. Yes, sir.

Q. Tell us what was said and done between the captain of the "Berwick" and the captain of the "Fulton," with reference to towing you in?

A. The steamer came alongside, and her captain saw the flag, and he asked the captain of the "Berwick" what he wanted, and he said to him, "I want you to report me to my owners in San Francisco. When going over the Nehalem bar I struck on the south spit, and am leaking; I am trying to make Astoria."

Q. What did the captain of the "Fulton" say? Just give us the conversation, as near as you can remember.

A. The captain of the "Fulton" got kind of mad at the idea of his being called out of his way, and he says, "That is a hell of a way to call a man out of his way to have him tell the owners anything about the vessel," and he started to go off; turned around and started to go off. No, I made a mistake there. He didn't go off the first time then, but he stayed there, and he says to the captain of the "Berwick," "Do you want a tow?" The captain says, "I don't know. How much do you want?" He

says, "I will tow you in for $250." The captain of the "Berwick" says, "I will give you $100." He says, "I don't want it," and he turned the steamer around and started to go off to the southward, in the direction of San Francisco. He proceeded, I guess, half a mile or so, and then he turned around again and came back. And he says, "Captain, who are your owners?" The captain of the "Berwick" says, "R. D. Hume & Co." He says, "I'll tell you what we will do. We won't argue about the price, but we will leave my owners and your owners to settle it between themselves." The captain of the "Berwick" says, "All right, that will do." The captain of the "Fulton" says, "Where do you want to go? Do you want to go right up to Astoria, or anchor after you get over the bar?" The captain of the "Berwick" says, "I want to go right up to Astoria, up to the wharf." He proceeded to give us his hawser, and he started in to tow us. By that time we had a very nice breeze.

Q. From which direction?

A. From the northerly direction. He started in to tow us, and he towed us, I don't know how long. It got dark. He kept towing us until about ten o'clock, or somewhere around that; I am not sure of the time. And some time later on, I don't know when, he sang out from the "Fulton," "Captain, lower down your sails, and we will hang on to you until daylight." So we lowered our sails, and in the meantime he swung around and proceeded outside the river again, outside, off the coast. That is all so far, up to that morning. Do you want me to relate any more? Shall I go on?

Q. Yes. Just go right on and tell what occurred next.

A. He hung on to us until about 4 o'clock, or 4:30, or somewhere about that time, and we saw a towboat coming out from the mouth of the river, and he proceeded to her, and he was there for a little while, I don't know how long, and after a while he turned around and made a circle and came alongside of the schooner "Berwick," the towboat did, and he says, "Let go the steamer's hawser and take mine."

Q. Who was it said that?

A. The captain of the towboat. The captain of the "Berwick," says, "You go forward and ask the captain of the "Fulton" what is to be done."

Q. He said that to you?

A. He said that to me, and I went forward. I sang out, "Fulton, ahoy!" and got an answer. I says, "What shall we do?" and he says, "Let go my hawser and take the towboat's hawser." We did as he told us to, and we proceeded into Astoria under the tow of the towboat "Escort No. 2."

Q. What time did you reach Astoria?

A. I am not positive as to that, but it was around eight o'clock; somewhere around that time—that is, at the wharf. We landed at the wharf and made fast.

Q. Did you see the "Fulton" discharging any rockets, or anything of that kind? A. No, sir, I did not.

Q. Did you ever hear of their having discharged any rockets to attract attention?

A. Did I hear any rockets?

Q. Yes, did you hear any? A. No, sir, I did not.

Q. If there had been any discharged, you would have seen them?

A. Yes, sir. It was perfectly clear, and there was no wind to speak of—a very light breeze at the time.

Q. Did the captain of the "Berwick" have any conversation with the captain of the tugboat?

A. When he came alongside first, the captain of the towboat, he says, "Is she full of water?" to the captain of the "Berwick." He says, "No." That is all he said, otherwise than telling us to let go the steamer's hawser.

Q. There was no conversation with reference to towing the "Berwick" in to the wharf, or anything of that kind? A. No, sir, nothing of the kind.

Mr. COUNTRYMAN.—You may cross-examine the witness.

Mr. FRANK.—I do not care to ask him any questions.

HENRY C. ANDERSON.

Subscribed and sworn to before me this 10th day of March, 1899.

L. S. B. SAWYER,
Special Commissioner.

R. D. HUME, a witness produced on the part of the plaintiff, having been duly sworn, testified as follows:

Mr. COUNTRYMAN.—Q. Mr. Hume, what is your business? A. I am a salmon-packer and merchant.

Q. Is your place of business in San Francisco?

A. I have an office in San Francisco, yes.

Q. You reside in Oregon?

A. Yes, sir. My residence is in Wedderburn, Curry county, Oregon.

Q. You are the owner of the schooner "Berwick," about which testimony has been given here?

A. I am, yes, sir.

Q. Were you, on the 4th day of last October?

A. I was the owner, then, yes.

Q. What was the schooner "Berwick" worth in the month of October, 1898?

A. That would depend altogether upon the use a person had for it. If she was put up on the market, she might sell at a private sale for $2,000. At auction, she would bring anywhere from $500 to $1,000, if there was anybody bidding for her.

Q. How old a boat is she?

A. She is ten or twelve years old; somewhere around there. I don't remember just exactly.

Q. Did you ever offer to pay the steamer "Fulton" for towing the "Berwick" in to Astoria?

Mr. FRANK.—I object to that as immaterial.

A. Shall I begin at the beginning of that, and tell the whole matter?

Mr. COUNTRYMAN.—I will reframe the question.

Q. Will you kindly state whether or not you offered to pay the agents or the owners of the steamer "Fulton" the amount of the contract price between Captain Anderson of the "Berwick" and the captain of the "Fulton" for towing your vessel into Astoria in October, 1898?

Mr. FRANK.—That is objected to as immaterial, and further, upon the ground that there is no evidence that there ever was any such contract as stated.

A. After I received the letter from the agent of the Navigation Company up there who had the tug "Escort" rented, or who had her in charge, demanding $750, I sent for the agent, that is, the representative man of Gray & Mitchell the agents of the steamer "Fulton," and showed him the letter I had received, where they had made a claim of $750. He said, "They didn't do anything, and we only get $100. If they are going to have $750, we ought to have more." I said, "I don't know anything about that." But he seemed to think, and expressed himself so, that this claim of $750 was entirely unreasonable.

Mr. FRANK.—I move to strike that all out as incompetent and immaterial.

A. (Continuing.) Then, when I finally got another letter, or telegram (I have forgotten which it is, now), saying that this bill must be paid before the schooner would be permitted to leave, I then telephoned down to the agent of the steamer "Fulton," and told him I had received a communication saying that they proposed to libel the vessel if I did not settle the bill before the schooner left, and asked him to see Mr. Spreckels and try and arrange the matter; that I was quite willing to hold the schooner and her cargo intact, and would do so if she could be permitted to come to San Francisco, so that, if we could not settle it, they would have the opportunity of libeling her, whoever had the just claim. I told him he had better see Mr. Spreckels and arrange the matter.

I said, in addition, "I don't recognize Mr. Spreckels." "Well," he said, "you take the right position." I said, "I hold myself ready to pay you the bill as per contract with the master of the "Berwick." Then he said, "You want a bill?" I said, "Yes. Send up the bill, and I am ready to settle it." "Well," he said, "that is all right." I said, "If my schooner is libeled and I am put to expense in this matter, I shall hold you responsible." "I don't think you can do that," he said. I said, "I think I can. At any rate, I shall try it." Then, fearing that he might repudiate the telephone conversation, I sat down and wrote a letter to him, in which I repeated the same warning. Then, in a day or two, Mr. Spreckels' representative man came in; I have forgotten his name now—I have got it somewhere. Have you a memorandum of it?

Mr. FRANK.—Is it Samuels?

A. I think it is Samuels. I think that is his name. He came into my office, and we talked the matter over, and I told him the way I looked at it, that we had no dealings with Spreckels, and, among other things, I told him that I already had a claim against Mr. Spreckels that never had been paid, that I did work for them that they never paid me for. We finally talked the matter over, and Mr. Samuels told me that this agent of the steamer "Fulton" had come down there with an order for $100, and said that he would not collect it just now; and Mr. Samuels, in talking the matter over with me, suggested that I should pay Mr. Spreckels $400 and close the

thing up. But I could not recognize Mr. Spreckels, from the stand I had taken, and I thought if they could arrange the matter between him and the agents of the "Fulton."

Mr. FRANK.—(Interrupting.) Do you consider this evidence, Mr. Countryman?

Mr. COUNTRYMAN.—No, I do not, that part of it.

Q. Whatever you said with Mr. Samuels is evidence, Mr. Hume, but not other conversations.

A. I am talking about what I said with Mr. Samuels.

Q. Very well, then. Go on and tell the whole story.

Mr. FRANK.—All this conversation between the witness and Mr. Samuels is objected to as incompetent and immaterial, and all questions concerning his attempt to compromise the matter are also objected to as incompetent and immaterial, and I move to strike the entire matter out.

Mr. COUNTRYMAN.—Q. Go on with the conversation between yourself and Mr. Samuels, the representative of the libelant.

A. I suggested that, provided they could agree among themselves, $200 would be an amount that I would consider. He said that would not leave them anything, if they had to pay out $100. I said to him, "What do you want to pay him anything for if he has not done anything, as you claim?" Then Mr. Samuels left me, and he said he would call again, but he did not call any more.

Q. You did, however, offer to pay according to the

contract made by the captain of the "Berwick" with the captain of the "Fulton"?

A. I offered to settle, and the agents of the "Fulton" proposed to send me a bill, which they did not do. They got frightened when I told them I should hold them responsible if my vessel got libeled.

Mr. COUNTRYMAN.—That last sentence may go out.

Q. You have owned various vesels plying along the coast, have you, Mr. Hume?

A. Oh, yes; I have owned quite a good number in the last twenty-five years.

Q. In that time. you have paid for towage in and out of different harbors on the coast, have you?

A. No, sir, I always made the other fellow pay.

Q. You had the tugboat? A. Yes, sir.

Q. At all events, you are familiar with the charges?

A. Yes, sir.

Mr. FRANK.—Q. Do you know anything about salvage charges?

A. No, sir. Whenever I have got a man in a pinch, I have never tried to rob him. I have had them in a pinch several times, but I didn't try to do it.

Mr. COUNTRYMAN.—Q. Do you know what the regular charges are along the coast for towing?

A. It depends upon the size of the harbor. Take these shoal water harbors, and the price has been as high as six bits. It runs all the way from fifty cents to seventy-five cents.

Q. Not in excess of seventy-five cents?

A. No, sir.

Cross-Examination.

Mr. FRANK.—Q. Did that lumber belong to you, Mr. Hume? A. No, sir.

Q. To whom did it belong?

A. It belonged to the Nehalem Mill Company. I don't know positively about that. The Harmon Lumber Company were the people to whom it was consigned.

Q. Who was the shipper?

A. I think it was the Nehalem Mill Company. I am not positive, however, that that is the title of the firm.

Q. At any rate, you were neither the consignor nor the consignee?

A. I had nothing to do with it at all. I was only furnishing the schooner to haul the lumber down for them.

R. D. HUME.

Subscribed and sworn to before me this 10th day of March, 1899.

L. S. B. SAWYER,
Special Commissioner.

And be it further remembered, that, by and with the consent of the counsel for the respective parties, the further taking of testimony under the commission herein to me issued, was continued and adjourned until Thursday, March 23, 1899, at the hour of 3:30 o'clock P. M. to be resumed at the office of Messrs. Andros & Frank, number 320 Sansome street, in the city and county of San Francisco, State of California; that at the said time and place I was attended by R. H. Countryman, Esq., repre-

senting the attorneys for the said claimant, and Nathan H. Frank, Esq., representing the attorneys for the said libelant; that Peter Rintoul, a witness on the part of the claimant in the within-entitled cause and matter, appeared then and there, and was by me first duly sworn and cautioned to testify the truth, the whole truth, and nothing but the truth, and did thereupon depose and say as is hereinafter set forth.

PETER RINTOUL, a witness produced on the part of the claimant, having been duly sworn, testified as follows:

Mr. COUNTRYMAN.—Q. Please state your age, residence and occupation, Mr. Rintoul.

A. I was born in March of 1860. I live at 605A Washington street, San Francisco. I am a seaman. Sometimes I go to sea as cook and sometimes as seaman; I am not particular as to that. You might say steward.

Q. Were you ever steward on the schooner "Berwick"?

A. I was steward at the time this accident happened.

Q. What were you doing at the time of the accident?

A. When we were going out from the Nehalem river we struck on the spit. We were following the steamer, right behind the steamer, right behind the steamer, and we struck right on the spit. The captain says, "Try the pumps." We tried the pumps, and she was not leaking right away, and up to the time we got the lines all coiled up. Then we didn't get any suck, not before we got into

Astoria. But he was not in a very hard position, because we could keep the vessel pretty well clear of the water. When we got abreast of Astoria, the wind gave out on us and the flag was hoisted up. Then the steam schooner, he came alongside, and he wanted to know what he wanted, and the captain says "Would you report us to R. D. Hume & Co.?" He says, "Is that all you want?" And our captain says "No, I am leaking, and I wish to be towed into Astoria." He says, "I'll tow you into Astoria." The captain says, "What will you charge?" He says, "$250." The captain says, "No, I can't pay that." Then he says to us, "Who is your owners?" And we told him R. D. Hume & Co. Then he took us in tow, and that night we were lying backward and forward across the Columbia river, and the towboat she came out to us, the "Escort No. 2," I think, was the boat, and he went to the steam schooner—he didn't come to us at all, and he didn't ask us any questions. The "Fulton' sings out for us to let go his towline, and the captain's son, who was the mate there—

Q. That is, the mate of the "Berwick"?

A. Yes, the mate of the "Berwick." He says to the captain of the "Fulton," "Will we let go the towline?" "Yes," he says, "let go our towline." The rowboat he came along, and he gave us his towline and towed us in.

Q. Of whom did he make the inquiry? You say he asked if you should let go the towline, the mate of the "Berwick"?

A. Yes, sir. It was to the "Fulton." I could not tell

exactly who answered, because it was dark, but the "Fulton" sang out, "Yes, let go my towline."

Q. Was there any conversation between the captain of the "Berwick," or the mate, or yourself, and the captain of the tugboat?

A. No, sir, no more conversation than he says to take his towline from him; that was all.

Q. To let go the "Fulton's" towline and take the tug's towline? A. Yes, sir, take the tug's line.

Q. When you were out on the ocean and the "Fulton" came to you the first time—but first, did the "Fulton" come to you more than once?

A. He never was away from us. He came alongside of us and spoke to us, and we were in speaking distance right along.

Q. Did he apparently start to go away?

A. Yes, sir. He made like he was going to go away and leave us. He made a round turn, and came around again to us, and wanted to know who our owners were.

Q. When the $250 was said to be too much, what agreement was made? Did you understand?

A. When he knew it was R. D. Hume & Co., he says, "Give me your towline, and let them settle it between themselves."

Q. How far apart were the two boats at the time of the conversation?

A. Do you mean the "Fulton" and us?

Q. Yes.

A. He may have been a hundred yards away, I guess. It was good hailing distance.

Q. Everything that was said was said very loud, so you could hear it?

A. Yes, sir. Everything had to be said loud so you could hear it.

Q. Did you ever hear of any agreement, or anything—

A. (Interrupting.) There was no agreement made at all, not as regards the tugboat. He came to the steam schooner first, and what they had to say, we could not tell. Then he came up to us and told us to let go the "Fulton's" lines and take his. The mate sang out, "Do you want us to let go your towline 'Fulton' "? And the "Fulton" says, "Yes, let go our towline."

Q. And then you had the tugboat's towline, and went to Astoria? A. We went to Astoria then, yes.

Q. Could you have made Astoria without any towline?

A. Yes, sir, I guess we could have made Astoria, but it would be a matter of a day or two. Of course, the vessel was not in any bad condition, exactly. She was leaking that much that it kept us pumping steady as far as that goes—We pumped right along. But lots of things could be done before she was really hard up. You could throw the lumber off the vessel, and that would help you by lightening her up.

Q. Is there not some method of dropping ashes or something over the outside of the vessel to stop the leaking?

A. There is what they call collision mats, but they have not got them on these sailing vessels.

Q. You think there would have been no trouble in the vessel getting to Astoria?

A. Oh, no, there would have been no trouble. There was no danger.

Mr. COUNTRYMAN.—That is all I have to ask.

Mr. FRANK.—I have no questions.

It was thereupon stipulated and agreed by and between the counsel for the respective parties that the testimony of the witness Peter Rintoul need not be read over by or signed by him, the reading and signing thereof being expressly waived.

And be it further remembered, that, by and with the consent of counsel for the respective parties, the further taking of testimony under the commission herein to me issued, was continued and adjourned until Thursday, March 30, 1899, at the hour of four o'clock P. M., at the office of Messrs. Andros & Frank, No. 320 Sansome street, in the city and county of San Francisco, State of California; that at the said time and place I was attended by R. H. Countryman, Esq., representing the attorneys for the said claimant, and Nathan H. Frank, Esq., representing the attorneys for the said libelant; that J. B. McIntyre, a witness on the part of the claimant in the within-entitled cause and matter, appeared then and there, and was by me first duly sworn and cautioned to testify the truth, the whole truth, and nothing but the truth, and he did thereupon depose and say as is hereinafter set forth.

J. B. McINTYRE, a witness produced on the part of the claimant, having been duly sworn, testified as follows:

Mr. COUNTRYMAN.—Q. Captain, were you ever the captain of the steam sloop "Fulton"?

A. Steam schooner, they call her.

Q. Were you ever the captain of the steam schooner "Fulton"? A. Yes, sir.

Q. Were you last year? A. Yes, sir.

Q. At the time she picked up the "Berwick"?

A. Yes, sir.

Q. State the circumstances under which you picked up the "Berwick."

A. As near as I can remember, she was about twenty miles off the coast, and she was under sail and in working order, with a flag set on the main—it was not set as a signal of distress, or anything like that, but just to attract attention. I changed my course and ran for her. When I got within hailing distance, I spoke to him and asked him if he wanted any assistance. He said, "I would like to be reported to my owners at San Francisco." That made me a little mad, to think I had run out of my way eight or ten miles, and I turned around and started on my course again, and the mate spoke up and said, "It is pretty hard to leave him there without finding out what he wants. He may want something." So I said yes, and turned around and went up to him and asked him what was the matter. He said that the tugboat had pulled him on the spit at Nehalem river coming out, and that he was making some water; that

the weather had been fine, and he was afraid if he came down the coast and got into heavy weather that she might open up on him. He asked me then if I would tow him into Astoria. I told him I would for $250. He said that he could not afford to give that much money, that the ship could go to San Francisco, and if I would take him in for $100, he thought it was better to go in there and see what damage was done, and then go on. I told him I would not do that, but that I would take him in and leave it with the owners to settle. He said, "Very well," and I gave him a hawser. I towed him in over the bar, and it was a nice moonlight night, very smooth. When I got in to the bar, the whistling buoy was gone, and I went on in further to the No. 0 starboard buoy, and started to run for the No. 2. Instead of making the No. 2, I made the No. 1 buoy on the portside. So I knew then that with a tow I could not run my courses, the course I had been running before that, and that it was better to take no chances. So I turned around and headed her off to the southwest, and put her on a slow bell, and went and laid down for a rest. While I was lying down, the tug came on—I think it was the "Escort No. 2"—and the captain of the "Escort" spoke to the second mate of the "Fulton," who had the bridge, and he told him to let go his hawser, that he would take the tow. The second mate says, "Well, I guess you had better speak to the captain about that." So he asked where the captain was. The second mate said he was down below, and he came down and called me out.

Mr. FRANK.—Q. You did not hear the conversation between the second mate and the "Escort's" captain?

A. No, sir, I did not hear that. That was what he told me.

Mr. FRANK.—I move to strike it out as hearsay.

Mr. COUNTRYMAN.—Q. The captain of the tugboat came down to see you when you were down in your cabin, did he? A. Yes, sir, afterwards, but not then.

Q. Did you go up from your cabin to the bridge?

A. Yes, sir. The second mate came in and called me out, and then I went up on the bridge and we, the captain of the "Escort" and I, talked the matter over a little while, and I told him no, I could take her in when daylight broke; that as I had lost about eight hours' time, I thought I would lose a little more. So then I talked to the mate—the mate came on at four o'clock, and we talked the matter over and came to the conclusion that if we let him tow her in we could make this place in the morning, and that would save us a day in discharging.

Q. Make San Francisco in the morning, did you mean?

A. Yes, sir, make San Francisco in the morning instead of at night, and that would give us a day's work, by letting the tug tow her in. So we got to talking, and he asked me if I had a cup of coffee on board.

Q. Who asked you that?

A. The captain of the "Escort." So he came aboard and we went down and had a cup of coffee. Down there he asked me for the tow.

Q. That is, the captain of the "Escort" did?

A. Yes, sir. He further asked me if we had been burning any lights. He said it had been reported at Astoria that there had been blue lights burning, and one thing and another. We laughed over that matter, for he came up and saw how things were situated, my having hold of the boat, and so on. We wondered how such a report could get around. I said it must have been because we had turned around several times on the bar, and our green and red lights would probably flash as the vessel turned around. However, he said he didn't like to come up for nothing, and he would have to go back home, and they would have the laugh on him, and he says, "I will tell you what I'll do." I said, "I expect to get closer to $250 than to $100 for the tow after she is landed in Astoria. If you are willing to take it on those conditions and give me $100, you can have her." He hemmed and hawed a little while, and he says, "Well, rather than go back empty, I will take her." So he went up into the purser's room with me, and the purser made out a check, and the captain of the tugboat signed it—a check on Spreckels.

Q. For what amount was that check? A. $100.

Q. What occurred then? Did he do anything?

A. He went aboard his vessel, and bid me "Good morning," and went back to the "Berwick" and asked the "Berwick" to let go the line. The captain of the "Berwick" sent his mate forward, and he said, "Will I let go of the hawser, Captain?" Says I, "Yes. He will tow you in, and everything will be all right." That is all. After that I proceeded on my way to San Francisco.

Q. Where were you when you first saw the "Berwick"? How far off the coast?

A. Oh, I was probably twelve miles off the coast.

Q. And where was the "Berwick"—further put at sea?

A. Yes, sir. She was about eight miles outside of me.

Q. And upon what part of the coast?

A. She was just about due west from the Columbia river—right off the mouth of the river.

Q. What was the condition of the weather?

A. The weather was very fine, and there was a light westerly wind blowing, at the time I picked her up, and from 10 o'clock on until morning the water was just smooth, glassy; no wind at all.

Q. Did you have any further conversation with the captain of the "Escort No. 2" than that which you have narrated, relating to the compensation you would receive for taking the "Berwick" into Astoria?

A. No, sir, I think not.

Q. Was anything discussed between you with reference to what it was worth to take the "Berwick" in to Astoria?

Mr. FRANK.—We object to that as immaterial.

A. Yes, sir.

Mr. COUNTRYMAN.—Q. What was stated between you and the captain of the "Escort No. 2" in that regard?

Mr. FRANK.—To that we make the same objection.

A. What was said about it? Why, we said that we thought that $250 was a big amount of money for the job.

Mr. COUNTRYMAN.—Q. Who said that?

A. Well, it was stated between us when we talked the thing over.

Q. And you and the captain of the "Escort No. 2" agreed that $250 was a large sum of money to pay for towing the "Berwick" in to Astoria?

A. We thought it very good pay.

Q. For towing her from where? From where you first picked up the "Berwick," or from where you were then? A. From where I first picked her up.

Q. Was anything said between you and the captain of the "Escort No. 2" with reference to what it was worth to take the "Berwick" in to Astoria from the place where you had her near the buoy at the mouth of the river?

Mr. FRANK.—We make the same objection, that it is irrelevant and incompetent.

A. No, sir, I think not. I don't think there was.

Mr. COUNTRYMAN.—Q. You did not segregate what the tow was worth from the place where you picked her up to where you were when the "Escort No 2" met you?

A. Yes, sir, I did. I said that I thought that I was amply paid to get $100 for eight hours' work. I said, "If the ship can make that every day in the week, she will be doing pretty well."

Q. Did the captain of the "Escort No. 2" say anything about what he thought it was worth to tow the "Berwick" in from the place where he met you to the city of Astoria?

Mr. FRANK.—I suppose it may be understood that the same objection follows as to all this line of testimony?

Mr. COUNTRYMAN.—Yes.

A. No, sir, I think not.

Mr. COUNTRYMAN.—Q. Did you tell the captain of the "Escort No. 2" that if he received $250 for the tow and paid you out of that the sum of $100 for what services you had rendered, that he would be well paid for his taking the vessel in to Astoria?

Mr. FRANK.—The same objection.

A. Yes, sir. He said he thought if he could get as much out of it as I did, it would pay him for coming out there.

Mr. COUNTRYMAN.—Q. Did you have any lights burning that night for the purpose of attracting attention? A. No, sir.

Q. Just your ordinary ship's lights?

A. Just the ordinary ship's lights.

Cross-Examination.

Mr. FRANK.—Q. Captain, when the "Escort No. 2" came out to you, you were not on the bar, were you? You were beyond the bar, out in the open ocean, were you not?

A. We had been in on the bar, and we were moving off to the westward again, probably out to where the whistling buoy should be.

Q. You had not crossed the bar that night, had you?

A. I had been in over it, and come back out again.

Q. You did not think you could make it that night?

A. It is a long channel after you get over the bar, and I didn't feel safe in running there, because the vessel was not running her courses with the tow.

Q. There are spits that run out on both sides at the entrance, are there not? A. Yes, sir.

Q. You have to make a rather close calculation to make the mouth of the river?

A. We had done that part of it all right. We had been in to the mouth of the river and come out again. You see, the water was so smooth that we could not see there —you know when there is any wind at all, the spits break on each side, and you can go along by that at night. But there was no water breaking, and I did not feel like going in when it was not breaking.

Q. So there was considerable danger in going in there with that tow, and such danger that you did not care to take the risk at that time?

A. I did not care to go in, not that there was any danger but then, there is a certain restraint that a man has on himself, so that he doesn't like to do those things.

Q. To take any chances?

A. And I believe there is a law prohibiting us from entering there at night, anyway. I believe that the underwriters have restrictions on that.

Q. What time of the night was it that the "Escort No. 2" picked her up?

A. Just at break of day. As we left him, it was getting on well towards daylight.

Q. There was no agreement between you and the master of the "Berwick" as to what your compensation should be?

A. No, sir. It was to be left to the owners.

Q. It was to be left to the owners of the two vessels?

A. Yes, sir. But the idea was—

Mr. FRANK.—(Interrupting.) I do not care what the idea was.

Mr. COUNTRYMAN.—I do. I want all of the witness' answer. We are entitled to the whole of his answer.

Mr. FRANK.—You are not entitled to anything but what actually passed between the parties. I do not want your conclusions with regard to the matter, Captain.

Mr. COUNTRYMAN.—We object to counsel's stopping the witness in his answer. Counsel can move to strike it out after it is done, if he so desires.

Mr. FRANK.—You will have an opportunity to re-examine the witness.

Mr. COUNTRYMAN.—Read the question and answer, Mr. Reporter. (The last question and answer read by reporter.) We submit that the witness has a right to complete his answer, and that counsel has no right to stop him from making his answer.

Mr. FRANK.—Q. If there was any conversation that passed between you upon that subject, you can relate it.

A. It is pretty hard to converse on the water, so I don't know that there was any conversation between the captain of the "Berwick" and myself.

Q. I understood you to say upon your direct examination that you went out there and he requested you to report him to his owners? A. Yes, sir.

Q. That you turned away from him, and then turned around and went back and asked him what he wanted, and he asked for a tow in? A. Yes, sir.

Q. And he wanted to know what you would charge, and you said $250, and he declined? A. Yes, sir.

Q. And offered you $100?

A. Well, no, he didn't decline it, but he answered, "I'll give you $100."

Q. He offered you $100, which you declined, and said you would leave it—

A. (Interrupting.) I said, "I will give you a hawser, and we will leave it to our owners."

Q. That you would leave it to be settled by the owners? A. Yes, sir.

Q. And that was the agreement under which you took him in tow ? A. Yes, sir.

Q. Did you notice how she was laden?

A. Yes, sir. She was loaded with lumber.

Q. Was she deep in the water?

A. Not necessarily.

Q. Up to the decks?

A. The decks were about awash.

Redirect Examination.

Mr. COUNTRYMAN.—Q. Captain, you were about to complete an answer when Mr. Frank interrupted you, with reference to some agreement or idea that you were

speaking of. Will you complete what you were going to say?

A. I was simply going to say that the way I had it in my head was, that we would probably have it settled somewhere between the $100 and $250, and that is the idea that I conveyed to the captain of the "Escort No. 2."

Mr. FRANK.—I move to strike that out.

Mr. COUNTRYMAN.—Q. When you say that is the idea you conveyed to the captain of the "Escort," how did you convey it to him—by the use of language?

A. Yes, sir. He was aboard me, the captain of the "Escort." We were sitting down, and, as near as I can remember, we talked over all these things.

Q. You and the captain of the "Berwick" had some coffee together, did you?

A. No, sir. This was the captain of the "Escort." I could not talk to the captain of the "Berwick," because he was on the other vessel and did not come aboard of me at all.

Q. So when the captain of the "Escort" came to you, you told him what conversation you had had with the captain of the "Berwick" with reference to the price of the towage? A. Yes, sir.

Q. Did the captain of the "Berwick" refuse to accept your offer to take him in for $250?

A. Well, I don't remember whether it was a refusal or not. I offered to take him in for $250, and he hollered back that he would give me $100, and I told him that we would have nothing to do with it anyway, or something

to that effect; that we would leave it to our owners, the owners of both of us.

Q. So far as the conversation between you and the captain of the "Berwick" was concerned, that was carried on by trumpeting, was it?

A. Yes, sir, through the megaphone.

Q. The conversation between you and the captain of the "Escort No. 2" was when you were sitting down talking?

A. Yes, sir, sitting down in the cabin at the table, talking.

Q. Did the captain of the "Escort No. 2" have any conversation whatever with the captain of the "Berwick"?

A. None whatever that I know of; simply to ask him to take his hawser. He didn't take his hawser, though, until he sent his mate forward and asked me if he should let go, and I told him yes, that the captain of the "Escort" would take him in on the same terms.

Q. Would take him in on the same terms?

A. Yes, sir.

Q. So whatever arrangement was made for the "Escort" to take the "Berwick" in, was made between you and the captain of the "Escort," with which the captain of the "Berwick" had nothing to do except to obey instructions? A. Yes, sir.

Q. Was the "Berwick" in any danger during that time, the time that you had her in tow, or before the time when you picked her up?

A. No, sir, I don't think she was. Not that I saw.

Q. Mr. Frank has asked you with reference to your

reason for not taking the "Berwick" in in the night time, whether there was not some danger. Would there have been any danger in taking her in in the daytime?

A. None whatever.

Q. So you could have taken her in the same morning that the "Escort" took her in?

A. I would have taken her right in, yes, sir.

Q. I gather from what you say that your only object in letting her go was to save the eight hours' time in your arrival at San Francisco?

A. Yes, sir, that is all; just to get down here in the morning instead of at night.

Recross-Examination.

Mr. FRANK.—Q. Where you were speaking of the idea you meant to convey, it was your conversation with the captain of the "Escort" that you were speaking of?

A. Yes, sir.

Q. There was no agreement between you and the captain of the "Escort," except that he was to give you the $100, and he was to get the balance of the pay for the services rendered? A. Yes, sir.

Q. He was to get paid for the entire services, including what you had rendered as well as the services by his vessel?

A. Yes, sir, after he had paid me the $100.

Mr. COUNTRYMAN.—Q. And to that agreement, as I understand it, the captain of the "Berwick" was not a party? A. No, sir, he was not at all.

J. B. McINTYRE.

Subscribed and sworn to before me this 31st day of March, 1899.

L. S. B. SAWYER,
Special Commissioner.

Mr. COUNTRYMAN.—I believe that concludes the testimony to be taken under the commission on the part of the claimant.

In the District Court of the United States in and for the District of Oregon.

IN ADMIRALTY.

J. D. SPRECKELS & BRO. COMPANY,
Libelant,
vs.
Schooner "BERWICK."
R. D. HUME,
Claimant.

Certificate of Special Commissioner.

United States of America,
Northern District of California. } ss.

I, L. S. B. Sawyer, Special commissioner herein, by virtue of the foregoing commission to me directed, do hereby certify that I caused Cornelius Anderson, H. C. Anderson, R. D. Hume, Peter Rintoul, and J. B. McIntyre, the above-named deponents, to come before me at the times and places in the captions to the foregoing

depositions mentioned, between the hours of ten o'clock A. M. and five o'clock P. M. of said days; that the said witnesses, being then and there duly cautioned and sworn to tell the truth, the whole truth, and nothing but the truth, in the cause aforesaid, in answer to the several interrogatories and cross-interrogatories propounded, gave the foregoing answers; that the said questions and answers were, in my presence and under my direction, taken down in shorthand and reduced to typewriting by one Ernest J. Mott, a disinterested person, a skillful stenographer and typewriter; that the said depositions, except the deposition of Peter Rintoul, were carefully read over by the said witnesses respectively and then by them subscribed in my presence; that the reading over and subscription of the witness Peter Rintoul of his deposition was duly waived by the counsel for the respective parties; that exhibits Nos. 1 and 2 on the part of the claimant were introduced in evidence in said cause during the taking of said depositions; that during the taking of said depositions, and on the days mentioned in the captions thereto, I was attended by R. H. Countryman, Esq., appearing for Messrs. Dolph, Mallory & Simon, attorneys for the said claimant in said cause, and Nathan H. Frank, Esq., appearing for Messrs. Fulton Brothers, of Astoria, Oregon, attorneys for said libelant.

No witnesses were produced before me on behalf if libelant.

Witness my hand this seventh day of June, 1899.

L. S. B. SAWYER,
Special Commissioner.

Exhibit "A."

UNITED STATES OF AMERICA.

State of Oregon,
County of Clatsop, } ss.
City of Astoria.

Be it known, that on this 7 day of October, A. D. 1898, before me, E. G. Rogers, a notary public, in and for the State of Oregon county of Clatsop, and dwelling in the city of Astoria, duly commissioned and sworn, personally came and appeared Cornelius Anderson, master of the American schooner called the "Berwick" of Empire City, of the burden of 99 tons or thereabouts, which sailed from Nehalem river, Oregon, on the 4th day of October, 1898, with a cargo —— lumber, bound for San Francisco and arrived at Astoria, Oregon, on the 6 day of October, 1898, and fearing damage owing to striking on the edge of the south spit while going over the Nehalem Bar during voyage, he hereby notes his protest before me, the said notary, against all losses, damages, etc., reserving right to extend the same at time and place convenient.

[25c. Rev. Stamp.]

CORNELIUS ANDERSON,
Master of Am. Schr. "Berwick."

Verified before me, the day and year first above written.

[Notarial Seal] E. G. ROGERS,
Notary Public for State of Oregon.

Protest.

UNITED STATES OF AMERICA

State of Oregon, } ss.
County of Clatsop. }

To all People to Whom These Presents Shall or May Concern, I E. G. Rogers, a Notary Public, in and for the said State and County, Duly Commissioned and Sworn, Dwelling in the City of Astoria, Oregon, Send Greeting:

Know ye, that on the 21st day of October, eighteen hundred and ninety-eight, in the year of our Lord, before me, the said notary, at my office in the city of Astoria, Oregon, personally appeared Cornelius Anderson, master of the American schooner "Berwick," belonging to the port of Empire City, Oregon (the said master having previously noted, in due form of law, his intention to protest), who, together with Peter Rintoul, cook, belonging to the aforesaid vessel, being by me duly sworn, voluntarily and solemnly did declare and depose as follows, to wit: That they, the said appearers, on the 4th day of October, 1898, set sail and departed in and with the said vessel from the port of Nehalem, Oregon, having on board a cargo of lumber, and bound for the port of San Francisco, California, the said vessel being then stout, staunch and strong, her cargo well and sufficiently stowed and secured, well masted, manned, tackled, victualed, appareled and appointed, and in every respect fit for the sea and the voyage she was about to under-

take; that we left the wharf of the Nehalem mill on October 4th, 1898, at 12 o'clock noon, in tow of the steamer "Maggie"; that while being towed over the Nehalem bar the vessel struck on the south spit; that the vessel had all sails set; that a moderate breeze was blowing from the south, southeast; that about ten minutes after the vessel struck the towboat signaled, by blowing a whistle, to let go the hawser, which we did, the towboat being unable to keep up the pace of the vessel; that the pumps were tried immediately, but found no water, but about twenty minutes afterward the pumps were again tried and found to be lots of water, and we immediately hoisted our flag, but no towboat in sight; that we immediately started the pumps, but no suck, but kept the pumps going all the time; that the captain went in the fore peak to see about the water in the hold, and found a heavy stream coming in on both sides of the keel; that at 8 o'clock P. M., on the 4th day of October, the wind got light, and at 12 o'clock midnight, on the same day, it was calm, but a strong current running from the south; that at 2 o'clock A. M., October 5th, we sighted the Columbia river lightship, and at 5 o'clock A. M. we were outside the Columbia river bar, the weather being calm at the time and a strong current running from the Columbia river to the northward; that the weather was calm all day until about 5 o'clock P. M., when a moderate breeze sprung up from the north northwest; that about 5:30 o'clock P. M., the steam schooner "Fulton" came alongside and offered to tow the vessel to Astoria that

evening for the sum of two hundred and fifty dollars, but the proposition was refused, and the sum of one hundred dollars was offered by the captain of the "Berwick," which was refused by the captain of the "Fulton"; that the captain of the "Fulton" proposed to leave the matter of the price of the towage to be adjusted by and between the owners of the respective vessels, which proposition was accepted by the captain of the "Berwick"; that the "Fulton" immediately passed her hawser to the "Ber wick"; that the "Fulton" towed the vessel until about 9 o'clock P. M., when the captain of the "Fulton" ordered the sails of the "Berwick" to be taken down, which or der was obeyed, and stated he would lay by until daylight; that at 4:15 A. M., October 6th, a towboat hove in sight, which proved to be the "Escort No. 2"; that the captain of the "Fulton" ordered his hawser let go, and the "Escort No. 2" passed her hawser to the vessel and towed us to Astoria, Oregon, where we arrived at 8 A. M., October 6th, 1898.

And the said appearers further declare that as all the damage and injury which has already has or may hereafter appear to have happened or accrued to the said vessel, her freight and cargo, has been occasioned solely by the circumstances hereinbefore stated, and cannot or ought not to be attributed to any insufficiency of the said vessel, the neglect or default of him, this deponent, his officers or crew. He now requires me, the said notary, to make his protest and this public act thereof, that the same may serve and be of full force and value, as of

right shall appertain. And thereupon the said master protested, and I, the said notary, at his special instance and request, did, and by these presents now do, publicly and solemnly protest against winds, weather and seas, and against all and every accident, matter and thing, had and met with as aforesaid, whereby and by means whereof the said vessel, her freight or her cargo, already has, or hereafter shall have suffered or sustained loss, damage or injury, and for all losses, costs, charges, expenses, damages and injury, which the said vessel, or the owner or owners of the said vessel, or the owners, freighters, or shippers of her said cargo, or any other person or persons interested or concerned in either, already have been or may hereafter be called upon to pay, sustain, incur or be put unto, by or on account of the premises, or for which the insurer or insurers of the said vessel, her freight or her cargo, is or are respectively liable to pay or make contribution or average according to custom, on their respective contracts or obligations, so that no part of any losses, damages, injuries or expenses already incurred, or hereafter to be incurred, do fall on him, the said master, his officers or crew.

Thus done and protested in Astoria, Oregon, this 21st day of October, in the year of our Lord eighteen hundred and ninety-eight.

In testimony whereof, as well as the said appearers, as I, the said notary, have subscribed these presents, and I have also caused my seal of office to be hereunto affixed, the day and year above written.

[Notarial Seal] E. G. ROGERS,
Notary Public.

[25c. Rev. Stamp.]

CORNELIUS ANDERSON,
Master.

PETER RINTOUL,
Cook.

State of Oregon, }
County of Clatsop. } ss.

I, the undersigned notary public, hereby certify that the foregoing act of protest to be an accurate and faithful copy of the original on record in my book of official acts.

[Notarial Seal] E. G. ROGERS,
Notary Public for the State of Oregon.

I, H. C. Anderson, being first duly sworn, depose and say that I was mate of the American schooner called the "Berwick" at the time the said vessel left the wharf at the Nehalem mill, Nehalem, Oregon, on October 4th, 1898, and until after the said vessel arrived at Astoria,

Oregon, and the statements and facts set forth in the attached protest are true, to the best of my knowledge and belief.

H. C. ANDERSON.

State of California,
City and County of San Francisco. } ss.

Subscribed and sworn to before me, the undersigned, this 14th day of November, A. D. 1898.

[Notarial Seal] JAMES L. KING,
Notary Public in and for the City and County of San Francisco, State of California.

That thereupon the claimant rested his case.

The foregoing is all the testimony introduced on either side upon the trial of the above-entitled case. The foregoing facts, as they do not appear of record, are hereby incorporated into this bill of exceptions, which is settled and signed by me this 14 day of December, 1900.

CHARLES B. BELLINGER,
Judge.

Filed December 14, 1900. E. D. McKee, Clerk.

And afterward, to wit, on the 14th day of December, 1900, there was duly filed in said court a notice of appeal, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

J. D. SPRECKELS & BROS. COMPANY,
Libelant,
vs.
The Schooner "BERWICK," Her Tackle, Apparel and Furniture,
Respondent.
R. D. HUME,
Claimant.

Notice of Appeal.

To J. D. Spreckels & Bros. Co., Libelant Above Named, and Charles W. Fulton, Proctor for Libelant:

Take notice that the claimant above named, R. D. Hume, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree entered herein November 22d, 1900.

DOLPH, MALLORY, SIMON & GEARIN,
Proctors for Claimant.

District of Oregon—ss.

Due service of the within notice of appeal, by the delivery of a duly certified copy thereof, as provided by law, at Portland, Oregon, on this 13th day of December, 1900, is hereby admitted.

C. W. FULTON,

Of Attorneys for Libelant.

Filed December 14, 1900. E. D. McKee, Clerk.

And afterward, to wit, on the 14th day of December, 1900, there was duly filed in said court an assignment of errors on appeal, in words and figures as follows, to wit:

In the United States Circuit Court of Appeals for the Ninth Circuit.

J. D. SPRECKELS & BROS. CO.,
Libelant,
vs.
The Schooner "BERWICK," Her Tackle, Apparel and Furniture,
Respondent.
R. D. HUME,
Claimant.

Assignment of Errors.

Comes now the said R. D. Hume, claimant, by Dolph, Mallory, Simon & Gearin, his proctors, and shows that in

the record and proceedings in the above-entitled matter there is manifest error in this to wit:

1. The said District Court of the United States for the District of Oregon erred in finding as a finding of fact:

"That on the 6th day of October, 1898, said tugboat was moored at a wharf in the port of Astoria, in this district, and about midnight the master of the tug, who was then in bed at his dwelling-house in Astoria aforesaid, was awakened by a telephone call and notified that rockets and signals of distress were being fired out at sea, and thereupon said master got his crew together and got up steam on the said tugboat and proceeded out to sea to ascertain what was wanted. At a distance of about ten miles off the Columbia river, being about thirty miles from Astoria, he found the respondent loaded with about 138,000 feet of lumber, leaking badly, but in tow of the steam schooner "Fulton."

2. The said District Court of the United States for the District of Oregon erred in finding as a finding of fact:

"Said respondent, the schooner 'Berwick,' on the 5th day of October, 1898, in tow of a tug, had crossed out from the Nehalem river, loaded as aforesaid, and bound for San Francisco, California. In passing out, said schooner struck heavily on the bar at the mouth of the Nehalem river and sprung a leak. The leak was not dis-

covered until the tug had let go of the schooner and started back into the Nehalem river, when a signal of distress was hoisted, but it failed to attract the attention of the tug, but did attract the attention of the steam schooner 'Fulton,' then on its way to San Francisco."

"The 'Fulton' spoke to the schooner, and the master of the schooner asked to be towed into the Columbia river, which the master of the 'Fulton' offered to do for $250, but the master of the 'Berwick' declined and offered $100 for the service. The master of the 'Fulton' declined that offer, but proposed to tow the 'Berwick' into the Columbia river and leave the price to be settled by the owners of the 'Fulton' and the 'Berwick,' and that proposition was accepted and the 'Fulton' took hold of the 'Berwick' and started in with her, arriving at the mouth of the Columbia after dark, but it was very clear, the moon was shining brightly, and objects could be plainly seen on the water. The 'Fulton' started in with her tow, but the 'Berwick' was well filled with water and was very low in the water and towed badly, and the 'Fulton' did not have sufficient power to handle her properly, and she drifted out of the channel, and thereupon the master of the 'Fulton,' fearing the tow would go ashore, turned and went out to sea and anchored, where they were found by the tug 'Escort,' as aforesaid.

The Court erred in finding as a finding of fact:

3. "The 'Escort' having arrived as aforesaid, the master of the 'Fulton' proposed that he should be paid $100 for the services thus far of the 'Fulton,' and that the 'Escort' should tow the 'Berwick' into Astoria, and the master of the 'Escort' paid the 'Fulton' $100 and took the 'Berwick' in tow and towed her safely to a dock in Astoria, where her cargo was discharged and her damages repaired."

The Court erred in finding as a finding of fact:

4. "That said schooner 'Berwick' was of the value of $5,000."

The Court erred in finding as a finding of fact:

5. "The 'Berwick' was so badly injured that she could not have lived at sea, nor could she have gotten into port without the aid of the 'Escort,' and the services performed by the 'Escort' were salvage services."

The said Court erred in finding that the services performed were salvage services, or other than towage services.

The Court erred in finding as a finding of fact:

6. "That the sum of five hundred dollars is a reasonable sum to be allowed for the services rendered as aforesaid by the said tug 'Escort' to said schooner 'Berwick,' and libelant is entitled to a decree for that amount against such schooner, her tackle, furniture, etc."

The Court erred in rendering on the 22d day of November, 1900, the following decree:

7. "This cause having come on to be heard on the pleadings and proofs produced by the respective parties, and having been argued by the respective advocates, and it appearing to the Court that the libelant is entitled to recover for the services alleged in the libel the sum of five hundred dollars, now on motion of C. W. Fulton, proctor for the libelant, it is ordered, adjudged and decreed that the libelant above named recover against the respondent above named the sum of five hundred dollars and costs, taxed at the sum of $80.50, making in all the sum of $580.50, for which sum said schooner, her tackle, furniture and apparel, are hereby condemned.

"It is further ordered, adjudged and decreed that unless this decree be satisfied or proceedings thereon be stayed on appeal within twenty days from the date of this decree and in the manner prescribed by the rules and practices of this court, the stipulators for costs and value on the part of said vessel cause the engagements of the stipulation to be performed, or show cause within the time prescribed by law why execution should not issue against their goods, chattels and lands to satisfy this decree."

The Court erred in not dismissing said libel and in not awarding claimant judgment for costs.

Wherefore, the said R. D. Hume, claimant, prays that the order, decree, and judgment of the said District Court of the United States for the District of Oregon be reversed and that said District Court of the United States for the District of Oregon be ordered to enter an order dismissing libelant's libel, and awarding claimant R. D. Hume judgment for his costs and disbursements.

DOLPH, MALLORY, SIMON & GEARIN,
Proctors for Claimant, R. D. Hume.

Filed December 14, 1900. E. D. McKee, clerk.

Clerk's Certificate to Transcript.

United States of America, }
District of Oregon. } ss.

I, E. D. McKee, clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered 1 to 85, inclusive, containing the caption, citation on appeal, and copies of all the pleadings, the bill of exceptions, which contains all the testimony and exhibits, the findings of the Court and final decree, the notice of appeal, and assignments of errors, constitute the apostles on appeal to the United States Circuit Court of Appeal for the Ninth Circuit, in the case of The J. D. Spreckels & Bros. Co., Libelant, vs. the Schooner "Berwick," R. D. Hume, Claimant, and that the said copies have been by me compared with the originals thereof, and that they are true copies of said originals and of the whole therof, as the same appear of record and on file in my office and custody.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said District Court, at Portland, in said District, this 23d day of January, A. D. 1901.

[Seal] E. D. McKEE.
Clerk.

[Endorsed]: No. 681. In the United States Circuit Court of Appeals for the Ninth Circuit. R. D. Hume, Claimant of the Schooner "Berwick," Her Tackle, Apparel, Furniture and Cargo, Appellant, vs. J. D. Spreckels & Bros. Co. Apostles on Appeal. Appealed from the District Court of the United States for the District of Oregon.

Filed January 26, 1901.

F. D. MONCKTON,

Clerk.

No. 681.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

R. D. HUME, claimant of the schooner Berwick, her tackle, apparel, furniture and cargo,

Appellant.

vs.

J. D. SPRECKELS & BROS. CO.,

Appellee.

Appellant's Opening Brief.

R. H. COUNTRYMAN,
Of Counsel for Appellant.

DOLPH, MALLORY, SIMON & GEARIN,
Proctors for Appellant.

Pernau Bros. Print 51 Clay St. S. F.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

R. D. HUME, Claimant of the Schooner Berwick, her tackle, apparel, furniture and cargo, Appellant, vs. J. D. SPRECKELS & BROS. CO., Appellee.	No. 681.

APPELLANT'S OPENING BRIEF.

Statement of the case.

R. D. Hume, the plaintiff in error, is a resident of Curry County, Oregon. He has an office in San Francisco. Appellee is a California corporation, and is the owner of the tugboat called the Escort, trafficking around and over the Columbia River bar.

Appellant is the owner of the 95 ton schooner Berwick. On October 4th, 1898, about 12 o'clock noon, the Berwick left the Nehalem River, Oregon, bound for

the port of San Francisco. The Berwick before starting on her passage was staunch and tight in every way, and her rigging, masts and general apparel were in good order. She had a cargo of one hundred and thirty-eight thousand (138,000) feet of pine, well stowed. She left the Nehalem River in tow of the tug Maggie. At the time the current in the ocean was northward, and the wind from the south. In leaving the Nehalem River, the Berwick struck on its south spit. The Maggie returned to the Nehalem River, and as the Berwick was taking water, its captain, on account of the current and the wind, concluded to run for the Columbia River, about thirty-five (35) miles distant, instead of continuing on his way to San Francisco. About seven o'clock in the morning of the 5th day of October, 1898, the Berwick arrived off the Columbia River. The day was calm, and the schooner was obliged to lie outside waiting for wind. About four o'clock in the afternoon a breeze sprang up and the Berwick started to sail. About 5:30 o'clock in the afternoon of October 5th, 1898, the steam schooner Fulton was spoken. The Fulton was on her way south from Gray's Harbor to San Francisco. The captain of the Berwick requested the Captain of the Fulton to report to the owner of the Berwick in San Francisco the fact that his vessel was leaking, and that he was on his way to Astoria. The captain of the Fulton criticised the captain of the Berwick for stopping him, and started on his way to San Francisco. After a short time his

anger subsided, he returned to the Berwick and discussed the rate of compensation for a tow to Astoria. The two captains remained on their respective vessels. The captain of the Berwick offered one hundred dollars ($100.00), the captain of the Fulton demanded two hundred and fifty dollars ($250.00). Finally the captain of the Fulton said that he would tow the Berwick to Astoria, and leave the amount of compensation to be fixed by the owners of the respective vessels. This proposition was accepted, and the hawser of the Fulton was passed to the Berwick. The weather was fine, the atmosphere was clear, and as night advanced the moon shone brightly. The Fulton and her tow arrived at the mouth of the Columbia about eight o'clock P. M. of October 5th, 1898. The captain of the Fulton was of the impression that the underwriters had some restriction against entering the Columbia River at night time, and also that there was a law prohibiting such entry. He, therefore, cruised around the mouth of the river waiting for day break. About 4:30 o'clock in the morning of October 6th, 1898, the tug Escort appeared. The captain of the Escort visited the captain of the Fulton, in the latter's cabin, and agreed on terms. The Escort paid the Fulton one hundred dollars for the tow, and then ordered the Berwick to release the hawser of the Fulton, and take the hawser of the Escort. The captain of the Escort did not consult the captain of the Berwick, and had no communication or conversation

with him until he issued the command to take his hawser. The Berwick refused to take the hawser of the Escort, and in place of doing so the captain of the Berwick commanded his mate to inquire of the captain of the Fulton whether or not the Berwick should take the Escort's hawser. The Fulton's reply was to take the Escort's hawser; that the Escort would complete the tow to Astoria. The Berwick thereupon took the Escort's hawser, and was towed to Astoria, arriving there about eight o'clock in the morning of October 6th, 1898. The claimant offered to pay for the services in accordance with the agreement with the Fulton.

On October 20th, 1898, a libel was filed against the Berwick. The vessel was arrested on October 21st, 1898. On October 22nd, 1898, a claim was filed, and the Berwick was released.

The depositions of the captain, the mate and the steward of the Berwick, and of the captain of the Fulton, as well as that of the claimant, were taken in San Francisco in March, 1899, and were returned by the Commissioner in June, 1899. The cause was tried in November, 1900, and a decree entered in favor of the libelant for five hundred dollars ($500.00) and costs.

From that decree the claimant has appealed to this Court, and contends that the testimony shows that the service rendered by the Escort was not a salvage service, but was merely a towage service, and that the compen

sation should have been fixed at the reasonable value of towage service on the Columbia River bar, taken in connection with the contract made by the captains of the Berwick and the Fulton; that the compensation as fixed is excessive, and that no allowance or compensation should have been awarded or decreed to the Escort, but the Escort should have been compelled to look to the Fulton for its compensation; that the Escort was merely the agent of the Fulton in carrying out its contract; that the Berwick was not in danger immediate or remote; she was leaking some, but was loaded with lumber, and had sailed without difficulty from Tillamook to the mouth of the Columbia River, and would have gone in unattended to Astoria. When spoken by the Fulton she did not ask for assistance, and did not need any. She wanted only to be reported in San Francisco. She contracted with the Fulton to tow her in to Astoria for a compensation to be fixed by the respective owners of the vessels, which compensation was not to be less than $100.00, nor more than $250.00. This contract was assigned by the Fulton to the Escort, the Escort completed the performance of the contract, and has no claim for salvage service, and none for towage service as against the Berwick.

Specifications of Error.

I.

The Court erred in holding that the services of the Escort were salvage services.

II.

The Court erred in not holding that the services of the Escort were merely towage services.

III.

The Court erred in not holding that the Escort was bound by the contract between the Berwick and the Fulton.

IV.

The Court erred in not holding that there was an agreement for towage to be not less than one hundred dollars ($100.00), nor more than two hundred and fifty dollars ($250.00).

V.

The Court erred in not holding that the Escort was the agent of the Fulton in towing the Berwick to Astoria.

VI.

The Court erred in allowing the libelant more than reasonable compensation.

VII.

The Court erred in stating as a finding of fact that "That on the 6th day of October, 1898, said tugboat was moored at a wharf in the port of Astoria, in this District, and about midnight the master of the tug, who was then in bed at his dwelling-house in Astoria aforesaid, was awakened by a telephone call, and noti-

fied that rockets and signals of distress were being fired out at sea, and thereupon said master got his crew together and got up steam on the said tugboat and proceeded out to sea to ascertain what was wanted. At a distance of about ten miles off the Columbia river, being about thirty miles from Astoria, he found the respondent loaded with about 138,000 feet of lumber, leaking badly, but in tow of the steam schooner "Fulton".

VIII.

The Court erred in stating as a finding of fact that "said respondent, the schooner 'Berwick' on the 5th day of October, 1898, in tow of a tug, had crossed out from the Nehalem river, loaded as aforesaid, and bound for San Francisco, California. In passing out, said schooner struck heavily on the bar at the mouth of the Nehalem river and sprung a leak. The leak was not discovered until the tug had let go of the schooner and started back into the Nehalem river, when a signal of distress was hoisted, but it failed to attract the attention of the tug, but did attract the attention of the steam schooner Fulton, then on its way to San Francisco."

"The Fulton spoke to the schooner and the master of the schooner asked to be towed into the Columbia river, which the master of the Fulton offered to do for $250, but the master of the Berwick declined and offered $100 for the service. The master of the Fulton declined that offer, but proposed to tow the Berwick into the Colum-

bia river and leave the price to be settled by the owners of the Fulton and the Berwick, and that proposition was accepted and the Fulton took hold of the Berwick and started in with her, arriving at the mouth of the Columbia after dark, but it was very clear, the moon was shining brightly and objects could be plainly seen on the water. The Fulton started in with her tow, but the Berwick was well filled with water and was very low in the water and towed badly and the Fulton did not have sufficient power to handle her properly, and she drifted out of the channel, and thereupon the master of the Fulton fearing the tow would go ashore, turned and went out to sea and anchored, where they were found by the tug Escort, as aforesaid."

IX.

The Court erred in stating as a finding of fact that "The Escort having arrived as aforesaid, the master of the Fulton proposed that he should be paid $100 for the services thus far of the Fulton, and that the Escort should tow the Berwick into Astoria, and the master of the Escort paid the Fulton $100 and took the Berwick in tow and towed her safely to a dock in Astoria, where her cargo was discharged and her damages repaired."

X.

The Court erred in stating as a finding of fact "That said schooner Berwick was of the value of $5,000."

XI.

The Court erred in stating as finding of fact that

"The Berwick was so badly injured that she could not have lived at sea, nor could she have gotten into port without the aid of the Escort, and the services performed by the Escort were salvage services."

XII.

The Court erred in stating as finding of fact "That the sum of five hundred dollars is a reasonable sum to be allowed for the services rendered as aforesaid by the said tug Escort to said schooner Berwick, and libelant is entitled to a decree for that amount against such schooner, her tackle, furniture, etc."

XIII.

The Court erred in stating as a finding of fact that "This cause having come on to be heard on the pleadings and proofs produced by the respective parties, and having been argued by the respective advocates, and it appearing to the Court that the libelant is entitled to recover for the services alleged in the libel the sum of five hundred dollars, now on motion of C. W. Fulton, proctor for the libelant, it is ordered, adjudged and decreed that the libelant above named recover against the respondent above named the sum of five hundred dollars and costs, taxed at the sum of $80.50 making in all the sum of $580.50, for which sum said schooner, her tackle, furniture and apparel, are hereby condemned.

"It is further ordered, adjudged and decreed that unless this decree be satisfied or proceedings thereon be stayed on appeal within twenty days from the date

of this decree, and in the manner prescribed by the rules and practices of this Court, the stipulators for costs and value on the part of said vessel cause the engagements of the stipulation to be performed, or show cause within the time prescribed by law why execution should not issue against their goods, chattels and lands to satisfy this decree."

XIV.

The Court erred in not dismissing said libel and in not awarding claimant judgment for costs.

Points and Authorities.

I.

A salvage contract, unless inequitable, is enforceable by the salvor. He should be bound, as well as benefited, by such a contract.

The C. & C. Brooks, 17 Fed. 548;
The Thornley, 98 Fed. 735;
The Tornado, 109 U. S. 110.

II.

This Court can review the findings of fact as well as the questions of law.

The Brandywine, 87 Fed. 652.

III.

The Escort became merely a substitute for the Fulton in towing the Berwick into Astoria, and in performing the duty that belonged to the Fulton.

The J. W. Husted, 36 Fed. 604.

IV.

There can be no salvage, unless the vessel assisted was in distress and peril.

The Viola, 55 Fed. 832;
The Emily B. Souder, 15 Blatch. 185.

V.

The Fulton being bound by the towage contract to take the Berwick in to Astoria, the Berwick was not in peril.

The Wasp, 34 Fed. 222.

VI.

The contract with the Fulton is the limit of liability.

Elphicke vs. *White Line Towing Co.*, 106 Fed. 945.

VII.

The services were only towage services.

The Catalina, 105 Fed. 633;
The J. C. Pfluger, 109 Fed. 93.

VIII.

The allowance is excessive.

The Bay of Naples, 48 Fed. 737.
The Monticello, 81 Fed. 211;
The Alice Blanchard, 106 Fed. 238;
The Kaiser Wilhelm Der Grosse, 106 Fed. 963;
The Santa Ana, 107 Fed. 527;

IX.

If the Fulton had left the Berwick instead of turn-

ing her over to the Escort, the Fulton would not be entitled to any compensation.

The Algitha, 17 Fed. 551.

X.

The burden of proof is on the libelant.

The Jarlen, 43 Fed. 176.

Argument.

The burden of proof being on the libelant (*The Jarlen*, 43 Fed. 176), and this Court having the power to review the findings of fact (*The Brandywine*, 87 Fed. 652), we will consider the evidence, which, we think, is strongly in favor of the claimant.

The Berwick was not in peril, danger or distress, either present or imminent, or immediate or remote. She could have reached Astoria, unaided, without any difficulty other than the temporary discomfort to her crew from the work of manning her pumps (p. 69, 70, 35 and 41). By the aid of a tow she could the sooner reach Astoria, her voyage would be thereby expedited, and her owner more quickly notified of her location.

The claimant took the deposition of Captain McIntyre of the Fulton, in March, 1899. As the cause was not tried until November, 1900, the libelant had some nineteen months in which to consider claimant's testimony before producing his own. We call attention to this interval of time because the libelant was so careful in the matter that at the time of the taking of claim-

ant's depositions he had all of the witnesses excluded, except the one under examination (p. 28).

Captain McIntyre testified as follows (pages 71 to 74):

"Q. State the circumstances under which you picked " up the 'Berwick'.

"A. As near as I can remember, she was about " twenty miles off the coast, and she was under sail " and in working order, with a flag set on the main—it " was not set as a signal of distress, or anything like " that, but just to attract attention. I changed my " course and ran for her. When I got within hailing " distance, I spoke to him, and asked him if he wanted " any assistance. He said, 'I would like to be reported " ' to my owners at San Francisco.' That made me a " little mad, to think I had run out of my way eight " or ten miles, and I turned around and started " on my course again, and the mate spoke up " and said, 'It is pretty hard to leave him there, with- " ' out finding out what he wants. He may want some- " ' thing.' So I said yes, and turned around and went up " to him and asked him what was the matter. He " said that the tugboat had pulled him on the spit at " Nehalem river coming out, and that he was making " some water; that the weather had been fine, and he " was afraid if he came down the coast and got into " heavy weather that she might open up on him. He " asked me then if I would tow him into Astoria. I " told him I would for $250. He said that he could not

" afford to give that much money, that the ship could
" go to San Francisco, and if I would take him in for
" $100, he thought it was better to go in there and see
" what damage was done, and then go on. I told him
" I would not do that, but that I would take him in and
" leave it with the owners to settle. He said, 'Very
" well', and I gave him a hawser. I towed him in over
" the bar, and it was a nice moonlight night, very
" smooth. When I got in to the bar, the whistling
" buoy was gone, and I went on in further to No. 0
" starboard buoy, and started to run for the No. 2. In-
" stead of making the No. 2, I made the No. 1 buoy on
" the port side. So I knew then that with a tow I could
" not run my courses, the course I had been running
" before that, and that it was better to take no chances.
" So I turned around and headed her off to the south-
" west, and put her on a slow bell, and went and laid
" down for a rest. While I was lying down, the tug
" came on—I think it was the 'Escort No. 2'—and the
" captain of the 'Escort' spoke to the second mate of
" the 'Fulton', who had the bridge, and he told him to
" let go his hawser, that he would take the tow. The
" second mate says, 'Well, I guess you had better speak
" to the captain about that.' So he asked where the
" captain was. The second mate said he was down be-
" low, and he came down and called me out, and then
" I went up on the bridge, and we, the captain of the
" 'Escort' and I, talked the matter over a little while,
" and I told him no, I could take her in when

" daylight broke; that as I had lost about eight hours'
" time, I thought I would lose a little more. So then
" I talked to the mate—the mate came on at four o'clock,
" and we talked the matter over and came to the con-
" clusion that if we let him tow her in we could make
" this place in the morning, and that would save us a
" day in discharging.

" Q. Make San Francisco in the morning, did you
" mean?

" A. Yes, sir, make San Francisco in the morning
" instead of at night, and that would give us a day's
" work, by letting the tug tow her in. So we got to
" talking, and he asked me if I had a cup of coffee on
" board.

" Q. Who asked you that?

" A. The captain of the 'Escort'. So he came
" aboard and we went down and had a cup of coffee.
" Down there he asked me for the tow.

" Q. That is, the captain of the 'Escort' did?

" A. Yes, sir. He further asked me if we had been
" burning any lights. He said it had been reported at
" Astoria that there had been blue lights burning, and
" one thing and another. We laughed over that
" matter, for he came up and saw how things were
" situated, my having hold of the boat, and so on. We
" wondered how such a report could get around. I said
" it must have been because we had turned around
" several times on the bar, and our green and red
" lights would probably flash as the vessel turned

" around. However, he said he didn't like to come up " for nothing, and he would have to go back home, and " they would have the laugh on him, and he, (I) says, 'I " 'will tell you what I'll do', I said, 'I expect to get " 'closer to $250 than to $100 for the tow after she is " 'landed in Astoria. If you are willing to take it on " 'those conditions and give me $100, you can have " 'her.' He hemmed and hawed a little while, and he " says, 'Well, rather than go back empty, I will take " 'her.' So he went up into the purser's room with " me, and the purser made out a check, and the captain " of the tugboat signed it—a check on Spreckels.

" Q. For what amount was that check?

" A. $100.

" Q. What occurred then? Did he do anything?

" A. He went aboard his vessel, and bid me 'Good " morning', and went back to the 'Berwick' and asked " the 'Berwick' to let go the line. The captain of the " 'Berwick' sent his mate forward, and he said, 'Will I " 'let go of the hawser, captain?' Says I, 'Yes. He " 'will tow you in, and everything will be all right.' " That is all. After that I proceeded on my way to " San Francisco."

On cross examination (p. 78), Captain McIntyre testified:

" Q. So there was considerable danger in going in " there with that tow, and such danger that you did " not care to take the risk at that time?

"A. I did not care to go in, not that there was any

" danger, but then, there is a certain restraint that a " man has on himself, so that he doesn't like to do " those things.

" Q. To take any chances?

" A. And I believe there is a law prohibiting us from " entering there at night, anyway. I believe that the " underwriters have restrictions on that."

On re-direct examination this witness testified (p. 82):

" Q. Was the 'Berwick' in any danger during that " time, the time that you had her in tow, or before the " time when you picked her up?

" A. No, sir, I don't think she was. Not that I " saw.

" Q. Mr. Frank has asked you with reference to " your reason for not taking the 'Berwick' in in the " night time, whether there was not some danger. " Would there have been any danger in taking her in " in the daytime?

" A. None whatever.

" Q. So you could have taken her in the same " morning that the 'Escort' took her in?

" A. I would have taken her right in, yes, sir.

" Q. I gather from what you say that your only " object in letting her go was to save the eight hours' " time in your arrival at San Francisco?

" A. Yes, sir, that is all; just to get down here in " the morning instead of at night."

The testimony of the captain, the mate and the

steward of the Berwick substantiate the testimony of Captain McIntyre (p. 35, 41, 55, 69, 70).

There is no conflict with the disinterested testimony of the captain of the Fulton, supported as it is by the captain, mate and steward of the Berwick, unless the statement of Mr. Randell, who did not see the Berwick until she reached the wharf at Astoria (p. 22), "The "schooner was in such a condition that she could not "possibly have lived at sea, nor could she have made "any port without the assistance of a tugboat", and the statement of Captain Howe (p. 24), "She was leak- "ing very badly, and could not possibly have lived "but a very short time at sea, nor could she have "sailed in to the Columbia river, as the wind was blow- "ing off shore", can be forced into a seeming contradiction of Captain McIntyre's testimony.

The Berwick at the time she took the hawser of the Escort was in the tow of the Fulton; she could have made the port of Astoria on the morning of October 6th, 1898, under the tow of the Fulton with the same degree of safety, and the same facility as under the tow of the Escort. She was not required to sail to Astoria, as she had the services of the Fulton to tow her in, and if she could live long enough for the Escort to tow her to Astoria, she would have lived at sea long enough for the Fulton to have towed her in. Besides, on the evening of October 5th, 1898, when the Fulton took the Berwick in tow, there was a "very fine breeze at the time" (p. 41), and the Berwick would undoubtedly

have made Astoria under her own sail, had not the Fulton been spoken. Captain Anderson, of the Berwick, did not ask for assistance. His sole request was to be reported in San Francisco, but when Captain McIntyre offered to tow the Berwick to Astoria, Anderson considered, under the circumstances, it was good business judgment to accept, provided the charge was reasonable. He refused to pay $250 because he thought that amount was extortionate (pp. 40–41), and an agreement was made for an amount between $100 and $250 to be fixed by the owners of the respective vessels.

This contract may not have been phrased in the precise and formal language of a legal document. A contract made on the high seas, where vessels are in constant motion from the action of wind and wave, and communication is by the use of megaphones, cannot be expected to have the formal characteristics of an agreement made on shore, or between two men on the same vessel. Such a contract would naturally be abbreviated, and the parties would assume what was readily understood and implied from the situation and language, that the minimum amount for the services was to be $100 and the maximum amount $250, and that instead of bargaining under the difficulty of the situation of the two boats, the precise amount between such minimum and maximum amount should be fixed by their respective owners.

There is no shadow of a doubt as to the making of

this contract, and that the Fulton was bound thereby. The amount paid by the Escort to the Fulton for the tow emphasizes and supports the testimony of Captain McIntyre, that he informed Captain Howe of the contract. Captain Howe (p. 24) denies that Captain McIntyre informed him of the contract, but it is singular that Howe inquired of McIntyre about a contract between the Fulton and the Berwick, but neglected to make such inquiry of the Berwick. If Howe was so cautious as to inquire of McIntyre whether he had any contract to tow in the Berwick, it is reasonable to assume that he would have verified the denial of such contract by McIntyre, or would have discussed terms with Captain Anderson. McIntyre relates with circumstantiality of detail the conversation between himself and Howe, and the fact that Howe paid McIntyre $100 and neglected entirely to make any inquiries of Captain Anderson, demonstrates that Howe knew of the existence of the contract between the Fulton and the Berwick at the time he ordered the Berwick to take the Escort's hawser. If he did not, the refusal of the Berwick to take the Escort's hawser, until after inquiry of and command therefor from the Fulton, would have put him on inquiry, the natural thought that would arise in his mind, considering his experience and his carefulness in inquiring of McIntyre as to the existence of a contract, is, why does the Berwick refuse to release the hawser of the Fulton and take the hawser of the Escort, unless there is a contract entered into between

the Fulton and the Berwick, which occasions the refusal. But whether or not Howe was informed of the contract, it is binding on the Escort as the agent for the Fulton. The agreement for the release of the hawser of the Fulton and the taking of the hawser of the Escort, was made between McIntyre and Howe. Anderson was not a party to it; he was not consulted, and, sailor-like, he obeyed the order, after inquiry of the Fulton, because he deemed it his duty to obey the instruction of the towing vessel. It would have been a simple matter for Howe to have inquired of Anderson about the existence of a contract between the Fulton and the Berwick, and his neglect to do so should not place him in a stronger position than if he had followed his plain duty, and most assuredly should not have terminated the contract relation of the Fulton and the Berwick, and caused the Berwick to be mulct in a large sum of money for salvage charges and costs. There can be no doubt that Anderson would have refused the hawser of the Escort had he thought there was any liability or responsibility in accepting it, in excess of the liability assumed under the contract between him and Captain McIntyre. "In view of these facts, if the master of the Monterey (Escort) expected to claim salvage compensation, he should have said so at the time, in order that the Souder (Berwick) might determine whether she would accept his services on that condition. There is no pretence of any such notice * * * and, in my opinion, no such service was in fact rendered.

Towage only was wanted, and that was the only service rendered or accepted." (*The Emily B. Souder*, 15 Blatch. 185.)

Conceding, for the purposes of the argument, that the Escort was not bound by the contract between the Fulton and the Berwick, the compensation awarded is excessive.

The libelant is engaged in the business of towage. It maintains two tugs, the Escort, and the Relief, for such purposes. The regular price of towing lumber ships over the Columbia river bar when they are loaded is fifty cents per thousand feet of lumber on board (p. 24). The towage charge or compensation, therefore, would amount to the sum of $69.00. The libelant was a volunteer, pursuing its ordinary and regular business, soliciting for towage. It assumed no risk, and compensation for its services did not depend on the successful towage of the Berwick to Astoria. The Escort's crew did not receive any extra compensation. It was a simple matter of towage. It would have been ample compensation had it been awarded the sum of $100.

On this point Captain McIntyre testified (p. 75):

" Q. Was anything discussed between you with " reference to what it was worth to take the 'Ber- " wick' into Astoria?

" A. Yes, sir.

" Q. What was stated between you and the captain " of the 'Escort No. 2' in that regard?

" A. What was said about it? Why, we said that " we thought that $250 was a big amount of money " for the job.

" Q. Who said that?

" A. Well, it was stated between us when we talked " the thing over.

" Q. And you and the captain of the 'Escort No. " 2" agreed that $250 was a large sum of money " to pay for towing the 'Berwick' into Astoria?

" A. We thought it very good pay.

" Q. For towing her from where? From where you " first picked up the 'Berwick', or from where you " were then?

" A. From where I first picked her up.

" Q. You did not segregate what the tow was " worth from the place where you picked her up to " where you were when the 'Escort No. 2' met you?

" A. Yes, sir, I did. I said that I thought I was " amply paid to get $100 for eight hours' work. I " said 'if the ship can make that every day in the " 'week, she will be doing pretty well.'

" Q. Did you tell the captain of the 'Escort No. 2' " that if he received $250 for the tow, and paid you out " of that the sum of $100 for what services you had ren- " dered, that he would be well paid for his taking the " vessel in to Astoria?

" A. Yes, sir. He said he thought if he could get " as much out of it as I did, it would pay him for com-

" ing out there."

(See also pages 79, 80 and 81.)

The trial Court inferentially found that the Escort proceeded to sea because of the notification that rockets and signals of distress were being fired (Finding 2, p 16).

The testimony is conclusive that no rockets were fired and no signals of distress were given. Captain McIntyre testified (p. 77):

" Q. Did you have any lights burning that night " for the purpose of attracting attention?

" A. No, sir.

" Q. Just your ordinary ship lights?

" A. Just the ordinary ship lights."

Captain Anderson testified (p. 51):

" Q. Did you see any rockets fired by the Fulton?

" A. Not to my knowledge. I never saw any " rockets fired there.

" Q. If there had been any rockets fired you would " you have seen them?

" A. Oh, I would be bound to see them.

" Q. You were awake that night, were you?

" A. Yes, sir.

" Q. And you would have seen the rockets if there " had been any fired?

" A. Yes, sir, I would have seen them all right. I " could not help but see them."

The mate of the Berwick testified that there were no rockets fired or discharged (p. 58, 59).

We think the evidence conclusively shows that no rockets were fired and no blue lights were burned.

The Court should not have fixed the value of the Berwick in excess of the sum of $2,000. Mr. Hume testified (p. 60) that the vessel, if put up at private sale, might bring $2,000. That at auction she would bring anywhere from $500 to $1,000. That she was from ten to twelve years old, of 95 tons burden.

We respectfully submit that the libel should be dismissed, and the appellant awarded his costs, in this, and in the trial Court.

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Dolph, Mallory, Simon & Gearin,
Proctors for Appellant.

No. 681.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

R. D. HUME, claimant of the schooner Berwick, her tackle, apparel, furniture and cargo,

Appellant,

vs.

J. D. SPRECKELS & BROS. CO.,

Appellee.

Appellee's Brief.

NATHAN H. FRANK,
Proctor for Appellee.

Pernau Bro. Print, 548 Clay St., S. F.

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APPELLEE'S BRIEF.

This appeal is principally founded on exceptions to the findings of the District Court upon questions of fact, and appellant has based his statement of the case upon what he thinks the Court should have found, rather than upon what the Court did find. Inasmuch as there is a conflict of testimony, the appeal involves the credibility of the witnesses, and a consideration of the testimony in support of as well as that against the finding of the Court. Since appellee contends for the correctness of the finding of the District Court, it

necessarily, in view of this conflict of testimony, disaffirms the appellant's statement of the case. The difference between us relates more particularly to the danger in which the schooner "Berwick" was; the nature of the agreement under which she was originally taken in tow by the "Fulton", and to the circumstances under which the "Escort" was substituted for the "Fulton". As these matters will be the burden of our discussion, we deem it unnecessary, at this time, to make a separate detailed statement of the facts.

The service began when the "Fulton" picked the "Berwick" up.—The first and most important step in any discussion is to determine what the disputed points are. The oral argument disclosed the fact, that while upon some points appellant and appellee were apparently taking opposite sides, they were not in fact discussing the same matter. Appellant insists that when the "Escort" came alongside, the "Berwick" was then in tow of the "Fulton", and therefore safe; hence, he concludes the services of the "Escort" would not be salvage services. Whether this proposition be sound or unsound is beside the issue, because our claim is not based upon the condition of affairs as they existed at the time the "Escort" came alongside, but upon the condition of affairs *at the time the "Fulton" picked the "Berwick" up.* The appellant is himself committed to this view by the III point made in his brief (p. 10), namely, that "the

" 'Escort' became *merely a substitute for the 'Fulton'* in " towing the 'Berwick' into Astoria, and in performing " the duty which belonged to the 'Fulton' ". In making this point he practically states our position, for we contend that the service of the two vessels was one entire service, and that we are under the circumstances entitled to compensation for the whole.

Having regard, therefore, to the common ground thus established, the real point of departure between us is in the view taken of the nature of the contract between the "Fulton" and the "Berwick"—appellant contending that it was a mere towage contract, and appellee contending that it was a salvage contract.

The first question that presents itself is:

Was the service rendered in the case at bar a salvage service?

It is well settled that where the vessel to which the service has been rendered is in danger "either present " or to be reasonably apprehended", the service is a salvage service.

M'Connochie vs. *Kerr*, 9 Fed. 53.

> " 'Mere towage service', says Dr. Lushington, (The Reward, 1 W. Rob. 177), is confined to vessels that have received no injury or damage; and mere towage reward is payable in those cases only where the vessel receiving the service is in the same condition she would ordinarily be in without having encountered any damages or accident" *Id.*

The District Court has found (p. 18), that "the 'Ber-
" wick' was so badly injured that she could not have
" lived at sea, nor could she have gotten into port with-
" out the 'Escort', and the services performed by the
" 'Escort' were salvage services".

The testimony upon which this finding is based is as follows:

S. B. RANDALL, p. 22.

" She was leaking very badly, so much so that they
" had to keep all of the pumps at work while she was ly-
" ing at the wharf to keep her from sinking, and at the
" same time they had to discharge cargo. She was
" loaded with lumber and they discharged the cargo of
" lumber and repaired the vessel.

" The schooner was in such a condition that she
" could not possibly have lived at sea, nor could she
" have made any port without the assistance of the tug
" boat."

R. E. HOWE, p. 24.

" She was leaking very badly, and could not possibly
" have lived but a very short time at sea, nor could
" she have sailed into the Columbia River as the wind
" was blowing off shore."

It will be noted that this record does not purport to be a transcript of the trial by question and answer, but gives the substance only of the testimony incorporated in a bill of exceptions. It would be impossible,

therefore, to find internal evidences in the testimony upon which to ground an argument to discredit these witnesses. On the contrary, they having testified in the presence of the Court, and their testimony having been adopted as true, every presumption is in favor of their credibility. *The nature of this record*, therefore, as well as the fact that there is a conflict of testimony, stands in the way of any reversal of the findings of fact of the District Court.

The Alijandro, 56 Fed. 621.

The evidence on behalf of the claimant, also, while showing an evident desire to make light of the condition of the vessel, contains elements of contradiction that serve to discredit their story.

It appears that the vessel struck on the bar of the Nehalem river, and immediately thereafter the master signalled for the tug which had towed him to sea, but was unable to attract his attention.

CORNELIUS ANDERSON, the master, testifies (p. 34):

"We had a southerly wind, and of course I went " below to find out if the water was gaining; I finally " went down forward to see and I could see that the " vessel was making water, and I concluded then, " the wind being from the southward, that I would run " to Astoria.

" By all appearances the schooner was all right, as " far as it went.

"Q. How was the water? Was it gaining on you, "or not?

"A. No sir; we just kept her about the same way.

"Q. Could you not have sailed into the Columbia "River yourself?

"A. Yes sir; that is what we were doing. All that "day, of the 5th we had calm; we could not sail because "we had nothing to sail with. At about 4 o'clock in "the afternoon a Northwest breeze sprung up, when we "started to sail, and we had a very good breeze, which I "think would have brought us in if we had kept on "sailing." (p. 35.)

"I have an idea that I would have got in that night, "but of course I did not care as long as the man offered "himself, to *take any chances of the kind*, although I "had a very fine breeze at the time." (p. 41.)

CROSS EXAMINATION.

"Q. I notice in this extended protest that you say "you found two *heavy streams coming in in the fore* "*peak.* Is that the fact?

"A. *Oh, yes; you could see some coming in at both* "*sides.*

"Q. How much water did you have in when you "arrived off the Columbia bar?

"A. I could not say.

"Q. Did you sound it?

"A. I could not sound it.

"Q. Why could you not sound it?

"A. We have no particular way of sounding it. The

" only way I could see there would be that if it had ex-
" tended above the skin of the vessel, I could have seen
" it in the fore peak; if the water had been above
" the skin I could have discovered it forward." (p. 46.)

" Q. I suppose you kept your men at the pumps all
" the time, both day and night?

" A. Mostly all the day. * * *

" Q. You were not bound for Astoria?

" A. I was not bound there; I went in there on ac-
" count of getting the vessel's leaking looked after; I
" didn't know what might happen on the way down,
" and I would not take any chances on going down on
" account of the vessel leaking; *I did not know what
" might take place*, so I thought I would go into As-
" toria and do what I could do there; of course I didn't
" fancy it would be good policy to go on to San Fran-
" cisco like that." (p. 47.)

H. C. ANDERSON, the mate, testifies:

" After they struck they pumped for about 10 or 15
" minutes, and did not get any suck. We continued
" on our course out to the Westward, and we found
" that we could not get any suck on the pumps, and we
" saw the tug boat was not making any attempt to turn
" back; we saw him go up the river, and the Captain
" said: 'I guess the best thing we can do is to go to
" Astoria.'" (p. 54.)

PETER RINTOUL (seaman and cook), p. 69, says:

"I guess we could have made Astoria, but it would "be a matter of a day or two; of course the vessel was "not in any bad condition exactly; she was leaking "that much that it kept us pumping steady, as far as "that goes; we pumped right along, but lots of things "could have been done before she was really hard up; "we could throw the lumber off the vessel, and that "would help to lighten her up."

The protest signed by the master and Peter Rintoul —speaking of the time after she struck—sets forth:

"That the pumps were tried immediately but found "no water, but about 20 minutes afterwards the pumps "were again tried, and found to be *lots of water*, and "we immediately hoisted our flag; but no towboat in "sight; we immediately started our pumps but got no "suck, but kept the pumps going all the time; that "the captain went in the fore peak and to see about the "water in the hold, and found a *heavy stream* coming "in on both sides of the keel." (p. 88.)

The vessel was repaired at Astoria; the nature and extent of the damage must have been disclosed at that time, yet no witness who was at work upon her repair at said port is called.

Upon the oral argument appellant called attention to the fact that the master upon cross examination (p. 47)

testified:

" Q. What repairs did you make?

" A. Had the garboard streak re-caulked.

" Q. The whole thing?

" A. Along the keel we treated the whole thing.

" Q. On both sides?

" A. On both sides, yes, sir."

This is supposed to have been an answer to the suggestion that none of the repairers were called. We fail to see how this meets the contention. In the first place, the master was an interested witness, while the persons employed at Astoria would have been disinterested. In the second place, the master was not called on by the appellants to testify upon this subject, but what he did testify to was brought out on cross examination. That cross examination shows a very much more serious condition of affairs than appellant is willing to admit. The opening of the garboard streak on both sides of the keel for the whole length is a very serious matter. This, taken in connection with the fact stated in the Protest (p. 88) that he "found a heavy stream coming in on " both sides of the keel" tends to show that Captain Randall's statement that she was in such condition that she could not possibly have lived at sea, is more nearly correct than the contention of the appellant. The natural presumption is that the testimony of the workmen at Astoria would have corroborated Captain Randall rather than the Captain of the "Ber-

wick", had they been called.

Having regard, now, to the rule that to constitute salvage service it must be rendered to a vessel in danger " either present or to be reasonably apprehended", it appears to us that the foregoing testimony of appellant, taken by itself, conclusively shows the existence of danger "either present or reasonably to be appre- " hended". The master says that while he had an idea that he would have got in that night, the "Fulton" having offered he did not care "*to take any chances of the kind*". He had two heavy streams coming in in the forepeak, and he could not say how much water he had at that time, and had no way of sounding. He had started for Astoria because he "would not take any " chance of going down on account of the vessel leak- " ing". "*I did not know what might take place.*" His apprehensions of danger are apparent and not unreasonable.

Peter Rintoul, while testifying that the vessel was not in any bad condition exactly, says that it would have taken a day or two to have gotten into Astoria. That she was leaking so that it kept them pumping steady, but lots of things could have been done before she was really hard up, namely, she could have jettisoned her cargo. From this it is but reasonable to infer that the witness meant only to testify that the vessel was *not in extremity*, but it is not fair to

presume that he meant to say that she was in no danger, either present or reasonably to be apprehended.

However, whatever might be the effect of the foregoing testimony standing alone, it certainly destroys the effect of other more positive testimony on behalf of appellants, and taken as a whole their testimony is not sufficient to induce the Court to reverse the finding of the District Court with respect to the danger, when such finding is supported by such positive testimony as that of Randall and Howe above referred to.

Cases cited by appellant.—Neither do we think that the cases cited by appellants in support of their position are of any avail with respect to the question here presented.

In the case of *The Viola* the facts do not show the lightship to have been in any danger. She had broken from her moorings in a storm, but was a new vessel, schooner rigged, well provisioned, fully equipped with sails, boats and anchors, and was in charge of an assistant engineer and crew of six men, including the cook, had set sail and was ably handled. In view of these facts both the lower Court and the appellate Court found she was in no danger.

The case of *The Emily B. Souder* is of a like nature. Here, the steamer had lost the flanges of her propeller, and went into the port of St. Thomas

under sail, where, being unable to obtain another propeller she laid in an additional stock of provisions and *started from St. Thomas for New York under sail.* She met with no difficulty on her way up, and made from *six to eight knots an hour* with an open breeze. After being *twenty-eight days out*, and within between fifty and one hundred miles from New York, she sighted and signalled the steamer "Monterey", which took her in tow into the port of New York.

> "The Souder was at the time in all respects tight, staunch and strong, and in no respect disabled except in her propeller. She was well manned and provisioned, and approaching the coast under circumstances which gave no reason to anticipate that she would not in due time reach New York in safety."

Where a vessel has left a port of safety, as in this case *The Emily B. Souder* did St. Thomas, and set sail for another port toward which she had been proceeding in regular order, at a fair rate, for twenty-eight days, is a very different matter from a vessel which strikes the bar, springs a leak, signals the tug to take her back where she came from, and failing this makes sail for the nearest port of distress, as did the "Berwick".

Under another head, but of similar import "that the services were only towage services", are cited *The Catalina* and *The J. C. Pfluger*, but in the case of *The Catalina* (105 Fed. 633), the Court distinctly held the services to be salvage services, but salvage services

of a low order. There was nothing, however, in the facts of the case to make it a parallel case with the case at bar. It is the case of a broken propeller shaft, not of a vessel springing a leak the extent of which is unknown, and the injured vessel proceeding upon her course under sail. The degree of peril in which the Catalina was is no measure of the degree of peril in which the "Berwick" was, because the elements which constituted the peril are not the same.

In the case of *The J. C. Pfluger*, 109 Fed. 95, the Court says:

> "Under the plain and well settled rule declared in the foregoing cases whether a *particular service is one of salvage or towage is always a question of fact* to be ascertained from a consideration of the circumstances under which the Court shall find the service was rendered."

Upon a consideration of the particular facts of that case the Court concluded that the bark was in no immediate peril, and was not disabled to such extent as to justify any reasonable apprehension for her safety in the future if left to her own unaided efforts in making port.

The fact in the case at bar is that the lower Court did find the vessel in peril, and the finding is supported by reliable evidence.

That the appellant in suggesting this point did not appreciate the difference between a towage and a salvage

agreement is conclusively shown by his citation of authorities. He cites *The Wasp*, 34 Fed. 222, where the contract was towage pure and simple. When the tow was contracted for, no element of danger was present, but the tow was in a safe port and desirous of making a voyage to another port, and the tug was employed to supply the motive power. The tug took the Wasp in tow at Norfolk, Va., bound for New London, Conn. While on that voyage they met with heavy weather that caused them to go into the Delaware breakwater for safety, where the tow was anchored about half a mile below the breakwater. While there anchored a heavy sea came on, whereby one or two of the hatches of the tow were stove in, and some of the water passed into the hold. The master, wishing to move to a safer location, signalled the tug which had contracted to tow him to New London, for the purpose of making such move. The "America" being engaged in a towing service pure and simple, the move in question was part and parcel of her duty as the towing tug, and the "McCauley" when substituted for the "America" was carrying out the "America's" portion of that contract.

Of a like nature are the facts in the case of *The J. W. Husted*, 36 Fed. 604, also cited by libelant. There a lighter was going up the North River in tow of the tug "Chapman" and while so in tow shipped water through the effect of swells from passing steamers. This was the danger from which she was supposed to

have been rescued, it becoming necessary to take the tow toward shore and pump her out. The Husted performed this service, and in doing so simply succeeded the "Chapman", in carrying out the "Chapman's" contract.

The foregoing disposes of the appellant's point referred to by us in our opening, that the "Fulton" was bound by a *towage* contract to take the "Berwick" into Astoria. In this appellant has failed to distinguish between a *towage* contract and a salvage agreement. The facts of the case do not permit such a construction to be put upon what passed between the master of the "Fulton" and the master of the "Berwick". If the finding of the District Court with respect to the condition of the "Berwick" at the time she was picked up be sustained, as we assume it must be in view of what we have already said, then the agreement between the "Fulton" and the "Berwick" was one to tow a vessel in distress into a port of safety, leaving the compensation to be settled afterwards. If the vessel was the subject of salvage, the fact that the "Fulton" took hold of her by agreement, instead of picking her up without the assent of the "Berwick" does not render the service any the less salvage. It is also to be borne in mind that the performance of the agreement involved a *deviation* on the part of the "Fulton", which both parties to the contract must have known, was beyond the authority of the master of the "Fulton" to enter

upon for the purpose of towage, or for anything short of salvage. In the language of the learned Judge in *Connochie* vs. *Kerr*, 9 Fed. 54,

> "It is not to be presumed, therefore, that such a departure from the voyage of the (Fulton) was either asked for or assented to, except upon the ground that the (Berwick) was in actual need of assistance, through circumstances of apprehended danger, and that some salvage compensation was expected to be paid."

The "Escort's" Relation to the Contract with the "Fulton".

As already stated, we admit the appellant's contention that the "Escort" was merely a substitute for the "Fulton" in performing the service contracted for by the "Fulton". As we have seen, however, the duty, to be performed by the "Fulton" was not towage, but salvage. When the "Escort" paid the "Fulton" the amount he asked, and took the vessel in tow, he became entitled by novation to the full compensation that the "Fulton" would have been entitled to had she brought the vessel into the harbor. The entire service was a single salvage service rendered by two successive salvors, the first one of whom passed his claim along to the second salvor.

The most direct testimony upon this point is that of the master of the "Fulton" who says that he told the master of the "Berwick" that the "Escort" would take him in *on the same terms as those agreed upon with the "Fulton"* (p. 82). Though the master of the

"Berwick" does not appear to have made any reply, he assented to the arrangement by casting off the hawser of the "Fulton" and taking that of the "Escort". As between the "Fulton" and the "Escort", the arrangement was that the "Escort" should pay the "Fulton" one hundred dollars, for which sum he was to receive whatever was coming to the "Fulton" from the "Berwick" under their agreement (p. 83). Appellant suggests that the "Berwick" was no party to this latter arrangement. It is not necessary that he should be, for he had no concern with the terms upon which the steamers agreed as between themselves, so long as the "Berwick" was not called on to pay more than she otherwise would have been. His only concern was that he should be towed in as per his agreement with the "Fulton", and his acceptance in the manner above indicated, of the "Escort's" line was an assent to the novation of his indebtedness to the "Fulton".

The "Escort" thus had an agreement with the "Berwick" to finish the service, and by novation is entitled to the entire compensation.

Value of the Service.—It is contended that by virtue of the negotiations between the "Fulton" and the "Berwick", where one offered $100 and the other demanded $250, the award should be fixed within those limits. It cannot be contended, however, that these negotiations amounted to a contract. On the contrary it was agreed that the matter be left to future adjustment by the owners. When the "Escort" was substituted to

take the "Berwick" in "on the same terms", by that agreement the *owners of the former* were substituted for the *owners of the "Fulton"*, so far as relates to this adjustment, and when these owners came together, one of them thought at least $750 should be the figure. (p. 61.) Carrying appellant's suggestion, then, to its logical conclusion, we have an agreement that the amount should be adjusted by the owners, one owner offered $100, and the other demanded $750, and failing to agree, the matter is thrown into Court. By this, the final arrangement between the parties, the limits are fixed between $100 and $750, and so, on appellant's ~~new~~ showing, $500 was quite within the range of his suggestion.

Independent of the foregoing if we be right in our contention that the service was one of salvage, the amount awarded by the lower Court should not be disturbed, for this Court, in view of the conflict of testimony with respect to the danger to the vessel, and also the conflict with respect to the value of the vessel, would scarcely be warranted in saying that the amount fixed by the District Court was an abuse of discretion, and it is only in such instances that the Appellate Court would feel itself called upon to interfere.

The District Court found that the schooner "Berwick" was of the value of $5,000 (Finding B, p. 17). This is supported by the testimony of Captain Randall

(pp. 22–23) and that of Howe (p. 24). The testimony of the claimants would make the value very much less. The master fixes it at $2500, and admitting that under certain conditions she might bring more (p. 50), and Mr. Hume, the owner, admits that she might sell at private sale for $2,000, but contends that at public auction she would bring from anywhere from $500 to $1,000, if there was anybody bidding for her (p. 60).

We do not think it necessary to dwell upon this testimony, in view of the finding of the District Court.

Upon an established value of $5000, $500 can scarcely be held to be an abuse of discretion on the part of the District Court.

We respectfully submit that the decree of the District Court should be affirmed.

NATHAN H. FRANK,
Proctor for Appellee.

No. 681.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

R. D. HUME, claimant of the Schooner Berwick, her tackle, apparel, furniture and cargo,

Appellant,

vs.

J. D. SPRECKELS & BROS. CO.,

Appellee.

PETITION FOR RE-HEARING.

R. H. COUNTRYMAN,
of Counsel for Appellant.

Pernau Bros. Print, 543 Clay St., S. F.

IN THE

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J. D. SPRECKELS & BROS. CO.,

Appellee.

No. 681.

PETITION FOR RE-HEARING.

The appellant respectfully requests a re-hearing herein.

The main issue in the case is one of agency, and not of admiralty. The "Berwick" employed the "Fulton" to tow her into Astoria. The "Fulton" sublet the contract to the "Escort". To the owners of the "Fulton," appellant would not have any legal defense to offer in an action brought to recover the contract price, to-wit, not less than $100.00 nor more than $250.00, but because the "Fulton" and the "Escort" divided the towage by an agreement to which the "Berwick" was not a party, we are put to a double charge, largely in excess

of the contract price. Suppose the owners of the "Fulton" had sued appellant, what defense could he offer? Suppose the owners of the "Fulton" brought their suit in State Courts, there would be a recovery there, and a recovery by appellee before the U. S. District Court. There is nothing to prevent the owners of the "Fulton" from bringing such an action now. The thought suggests itself that appellant might plead the Statute of Limitations, or in other words, concede the liability, but deny the remedy. Would that be a good defense? The action is transitory. Mr. Hume was absent from the United States for some months, and there is a serious question, whether, either under the law of California or of Oregon, the Statute of Limitations would run in his favor. But why should he, if sued, be driven to make this defense? Would it be honest in him to do so? His captain made the contract, and he was willing to comply therewith and to pay for the services pursuant to its terms. (Tr. pp. 61 & 62.)

The contract is a simple case of agency. Citation of authority seems unnecessary to support the proposition that if A employs B to perform a certain service, and B sublets the contract to C, the contract between A and B is not thereby changed or altered in any particular, neither is the burden of A increased, no matter what the relations may be between B and C. As a matter of convenience B selects C to perform the work which B contracted to do for A. It is immaterial to A who performs the service, and C is simply the agent or employee of B in the performance of the work. The rule is elementary, the only exception being where B is

to perform a service that is entirely personal, as for example, if B were a famous opera singer, or a great actor, or a great musician, and had contracted to fill certain engagements, he could not employ a substitute, but in the ordinary course of business and in the consummation of an ordinary business contract B could employ any person for his agent or employee he saw fit; the person so employed, C, must look to B for his compensation, the contract for the performance of the work being confined to A and B.

The idea of novation suggested by appellee in his brief, page 17, which was filed subsequent to the oral argument, shows confusion of thoughts on legal principles. Novation is a substitution of a new obligation for an existing one, and what counsel speaks of as a novation would simply be an assignment of indebtedness by the owners of the "Fulton" to the owners of the "Escort". There was no new obligation. The obligation of the "Berwick" was not changed by the substitution of a new creditor by assignment. The assignment of a debt, or of an obligation, is not a novation. There is no new debt, simply a new creditor.

The rule in admiralty is not different. The authority cited on page 10 of our brief unquestionably established the proposition that a salvage contract, unless inequitable, is enforceable by the salvor, and that he should be bound, as well as benefited, by such a contract seems axiomatic. The ordinary towage charge would have been $69.00 and therefore there is nothing inequitable in our position that the "Fulton" and the "Escort" should not have been allowed, particularly

without our consent, to vary the contract to our prejudice. In fact we never recognized the "Escort" in any capacity except as the instrument of the "Fulton". By agreement between the "Fulton" and the "Escort" the "Escort" was substituted to tow the "Berwick" into Astoria. The "Berwick" was not consulted in the transaction and not a party to the substitution. The "Berwick" refused to take the hawser of the "Escort" until ordered to do so by the "Fulton". Anderson, the captain of the "Berwick", simply acted as any sailor would have done who was trained to obey orders. A vessel in tow always obeys the orders of the towing vessel.

We think that the portion of the opinion of the Court reading as follows, "We are of the opinion that the tes-
" timony on behalf of the claimant does not discredit
" the claim that a substantial salvage service was ren-
" dered the 'Berwick' in distress by the steamer 'Ful-
" ton' and the tug 'Escort', and that under the circum-
" stances of this case both these services should be
" treated as one continuous salvage service", is not sustained by the evidence, and is opposed to well established principles of agency.

While in one sense it is true that the "Fulton" and "Escort" rendered one continuous service, it is only true when considered in the light of principal and employee, and as being a service performed under a contract of employment in the consummation of which the "Escort" was a mere employee of the "Fulton". The service was in no sense a salvage service. The agreement between the "Berwick" and the "Fulton" was one of

towage. Salvage services would have been refused. The evidence is conclusive on that point, and the Court should not make a contract for the parties which they would not have made for themselves.

But whether the agreement was one of towage or salvage the agreement was made by the "Berwick" with the "Fulton", and the "Escort" by its agreement with the "Fulton" could not render the "Berwick" liable to it for any service which the "Escort" rendered pursuant to its agreement with the "Fulton".

In the opinion it is said, "The agreement reached " between the masters of the 'Berwick' and 'Fulton' " that the latter should tow the 'Berwick' into the Col- " umbia River and leave the compensation to be settled " by the owners of the 'Fulton' and the 'Berwick' was " not limited by the previous offer of the master of the " 'Fulton' to perform the service for $250. That offer " was rejected, as was the offer of the master of the " 'Berwick' to pay $100.00 for such service. It re- " mained then for the owners of these two vessels to " agree upon the compensation to be fixed for the ser- " vices rendered the 'Berwick', and failing in this to " have the question determined by the Court."

The owners of the "Berwick" and "Fulton" did not fail to come to an agreement as to the amount of compensation to be paid the "Fulton", and until such failure, or at least until a refusal on the part of the owner of the "Berwick" to reasonably consider the amount of such compensation, no cause of action arose, and any action brought by the owners of the "Fulton" against the owner of the "Berwick" would be premature, unless

the owner of the "Berwick" had refused to agree upon the amount of compensation or to give the question of compensation reasonable consideration. Certainly the owners of the "Escort" are not in any higher or better position than the owners of the "Fulton". Looking at the matter from the most favorable standpoint of appellee, the owners of the "Escort" simply stand in the shoes of the owners of the "Fulton", and have no greater right than the owners of the "Fulton".

To our mind there seems to be no chance for argument that the agreement between the master of the "Fulton" and the master of the "Berwick" was that the amount of compensation was to be not less than $100.00 and not more than $250.00. It is plain that they were agreeing on a minimum and maximum charge. The Captain of the "Berwick" refused to pay $250.00 because he thought that amount was extortionate, and to think that he would set the matter at large and put himself in a position where his vessel might be charged with more than $250.00 is simply inconceivable. This contract should be considered from the standpoint of a seafaring man, and the implications and mutual understanding that men have when making verbal contracts. A contract made on the high sea through speaking trumpets is not apt to have the circumstantiality of detail that is found in a legal document with its preambles and amplifications.

Assume that A, B, and C are in a room, A contending that a certain service is worth $100.00, B contending that the service is worth $250.00, and finally they say: "We leave the question to C." There could

be no doubt that all parties would understand that C was to fix the amount between $100.00 and $250.00 and not be permitted to fix it at $5.00 or $5,000.00. The question in dispute is between the $100.00 and the $250.00. The rejection is to be limited to those two amounts. Those are the amounts that the parties have in mind as a minimum and maximum amount between which the arbitrator is to fix the amount to be paid. There never was any idea in the minds of these contending Captains to set the entire matter at large, and have any referee, either the owners of the vessels, or the Court, award more or less than the minimum and maximum amounts over which they were contending.

We earnestly call the Court's attention to the authorities and argument set forth in our brief, which we deem it unnecessary to repeat, and respectfully submit that the Court has erred in affirming in applying the law to the facts disclosed by the record.

R. H. COUNTRYMAN,
of Counsel for Appellant.

I hereby certify that the foregoing petition for rehearing is in my opinion well-founded in point of law, and that it is not interposed for delay.

R. H. COUNTRYMAN,
of Counsel for Appellant.

No. 683

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

TRANSCRIPT OF RECORD.

HOME LAND AND CATTLE COMPANY (A CORPORATION), and THE NATIONAL BANK OF COMMERCE (A CORPORATION),

Appellants,

vs.

CORNELIUS J. McNAMARA AND THOMAS A. MARLOW, Copartners Under the Firm Name and Style of McNAMARA & MARLOW,

Appellees.

VOL. II.

(Pages 321 to 633, inclusive.)

Appeal from the Circuit Court of the United States for the District of Montana.

FILMER BROTHERS ELECTROTYPE CO. PRINT., 424 SANSOME ST., S. F.

Q. No one asked you to count, then?

A. No, sir.

Q. After McNamara and Marlow had picked out their five hundred head, the balance were turned into another corral? A. Yes, sir.

Q. Did you count that bunch?

A. No, sir; I did not.

Q. Was there any dispute between these parties as to the five hundred head, as to the count, Marlow on one side and Sharp, Niedringhaus and Blackman on the other?

A. At the time the animals were running through and they counted there was some dispute.

Q. But finally they got into the corral what each side agreed was five hundred head?

A. I suppose so; I had heard McNamara and Marlo was to take five hundred head and I naturally thought there was five hundred head in the corral.

Q. What time of day was it the horses were turned out of the corral?

A. If they were put in at twelve o'clock, I should think when they were taken out it might have been three o'clock; it might have been later or earlier.

Q. And all of the horses except Caldwell's were taken back to the ranch?

A. They were taken back across the river and were turned loose.

Q. Caldwell's horses were part of these, were they?

A. Yes, sir.

Q. Were his among the five hundred Marlow said he would take?

A. Yes, sir; some might have been in both places; there could have been a few in the eighty, two or three, but I suppose the majority was in the picked bunch.

Q. How many horses did Caldwell cut out?

A. About one hundred.

Q. How long did it take him?

A. About one hour.

Q. Did you take the balance back?

A. I helped to take them back.

Q. Did you take them to the ranch?

A. We swam them across the river and that was the pasture.

Q. Don't you remember about what time of day it was when you got the horses down to the river?

A. I don't know exactly what time it was, but we got them back before sundown, before dark.

Q. After the five hundred head had been counted out and those that were not to be taken had been put into the little corral, how long had they been separated?

A. They were all turned together again.

Q. That was done at once? A. Yes, sir.

Q. Now, you say that when you came up this time Mr. Blackman asked you whether you thought there were any more cattle on the range it would pay to work?

A. He did not ask me that at the ranch.

Q. Where did he ask you that?

A. At the mouth of Crow Rock, and after I got back to the ranch, Niedringhaus asked me.

Q. It was Mr. Niedringhaus? A. Yes, sir.

Q. Where were your cattle then?

A. I did not have any at that time that Blackmon asked me; I had turned them over; when Niedringhaus asked me I had 320 head.

Q. Then the three hundred and twenty you drove in and turned over to Caldwell were collected after this conversation?

A. Yes, after that talk with Blackmon.

Q. You said it was after you had worked the range?

A. I had not worked the range then; I was just beginning on the range the second time.

Q. So this conversation did not occur on or about the 15th or 16th of October?

A. No; at that time Niedringhaus asked me what I thought about the cattle over on the range?

Q. What was the date of this conversation with Mr. Blackmon?

A. It might have been the day I turned the cattle over to Birch.

Q. What was that?

A. The 16th of September, I was on the range and might not have had the date right.

Q. You told Mr. McIntire you had a conversation with somebody at the ranch? A. Yes, sir.

Q. Who was this—Niedringhaus?

A. I don't think there was anybody there; I was only there a few minutes, but I think Niedringhaus, Blackmon and Caldwell must have been there.

Q. What makes you think Mr. Niedringhaus was there? A. I know he was there.

Q. Was he the man you had the talk with?

A. We were all talking.

Q. Who commenced the conversation?

A. I think Mr. Niedringhaus.

Q. What did he say?

A. He asked how many cattle were on the range, and I said I didn't think they could get five hundred head there. He seemed to think I ought to get fifteen hundred head there.

Q. Was there anything else said?

A. I believe that was all.

Q. Now, when Mr. Niedringhaus was saying this and you were giving this amount, where was Mr. Blackman?

A. In the room.

Q. Did he have anything to say?

A. I do not know that he did.

Q. Where was Caldwell?

A. Outside, I think.

Q. This conversation occurred in the office?

A. Not right in the office, in Blackman's room, in his part of the building.

Q. In Blackman's bedroom?

A. No, sir; in his sitting-room.

Q. You quit down there on the 15th of November?

A. Yes, sir.

Q. Were you discharged? A. Yes, sir.

Q. Where have you worked since that time?

A. I went to work for McNamara and Marlow.

Q. Did you go to work for them immediately?

A. No, sir; not immediately, but about the 15th of December, I think; I could tell exactly by asking Mr. Marlow.

Q. You have been working for McNamara and Marlow since? A. Yes, sir.

Q. Did you ever work for them before?

A. No, sir.

Redirect Examination.

(By Mr. McINTIRE.)

Q. Who was it jumped on the fence after the horses were turned into the corral and told you to take the horses back? A. Mr. Niedringhaus.

Q. When the count was going on was the number counted in your presence?

A. Yes, sir; McNamara, Blackman, and Sharp would all count ten and I would keep count of it.

Q. Did you hear the final number called?

A. Yes.

Q. That was 575 head?

A. Yes, sir; I heard them say that was the number.

Q. In your cross-examination you stated that you went over the N range more than once?

A. Yes, sir.

Q. How many times did you go over it?

A. Twice.

Q. How many cattle did you get the second time?

A. These I turned over to Dave Birch and then I only got three hundred and twenty head.

Q. Your entire part of it?

A. South of the Missouri River.

Q. That was your part of the range?

A. Yes, sir.

Q. Now, on the first gather in the same district how many cattle did you get?

A. Four thousand and some odd head.

Q. At this place?

A. That was my whole gather. I first turned over about a thousand head to Shuler and then again 1,662 turned over to Shuler; then I got 1,195 head and turned over to Birch; that was in the same country.

Q. That makes 3,857.

A. Yes, sir; and afterwards I turned over 320 head.

Q. In answer to a question on cross-examination you stated you knew the orders from what the boys told you?

A. Yes, sir.

Q. Were there any orders given to you?

A. Yes, sir.

Q. Who gave you orders? A. Loss Blackman.

Q. And you were to gather and ship everything?

A. Yes, sir.

Q. In your cross-examination you said Blackman did not tell you exactly about it as to how many were shipped; how is that?

A. I asked him how many head of cattle; he said less than 600 shipped in 1898.

Q. What were the orders as to the place of shipment of these animals? A. To what place?

Q. Yes. A. To Rosenbaum Brothers.

Q. In what city? A. Chicago.

Q. You said again in your cross-examination that the 79's had taken the west part of the N-N range?

A. Yes, they had taken their cattle and put them there.

Q. They took the range because no cattle were left there, did they not? A. Yes, sir.

Q. Who gave you the orders in the spring of 1897 to hold all animals and bring them to the shipping points?

A. I was not supposed to bring them to the shipping points.

Q. Well, the orders to hold the cattle?

A. Mr. Blackmon.

Q. After the horses were driven out of the corral you say Caldwell cut out a hundred? A. Yes, sir.

Q. Do you know what he cut them out for?

A. Yes, sir.

Q. Tell us.

A. To hold them cattle on; he could not hold them a foot.

Q. How many camps did the Home Land and Cattle Company have? A. They just had a horse camp.

Q. How far from the home ranch?

A. About forty miles.

Q. In 1896 and '97 how many did they have?

A. Only two that winter, but they worked more men.

Q. Where were they? A. Rock Creek.

Q. On the cattle range?

A. Blackmon used to live there; it was headquarters for the north side of the range.

Q. North of the river? A. Yes, sir.

Q. Did they have a horse camp on the Porcupine?

A. Yes, sir.

Q. But this camp in '97 and '98 was for supervising and looking after the horses? A. Yes, sir.

Q. Who were there?

A. Leavitt and me drawing pay.

Q. How many were in the employ of the company?

A. Three men.

Q. In '96 and '97 how many men were there?

A. Five or six men working that winter.

Q. Who was at the home ranch in '97 and '98?

A. Part of the time I was there and Glen Morrow, who is working there now.

Q. Was Blackmon on the ranch in '97 and '98?

A. Yes, sir.

Q. These four men were all that were there in '97 and '98?

A. Yes, sir; there might have been a few when they were cutting ice or something like that.

Q. You four occupied the position of foreman?

A. Yes, sir.

Recross-Examination.

(By Judge CULLEN.)

Q. You were not foreman, but wagon boss, were you not? A. Yes, sir.

Q. Now, when these horses were taken up there and put into corral, was the whole entire bunch counted?

A. I think they were.

Q. Do you know they were?

A. Five hundred head were counted.

Q. Was not that all that were counted?

A. No, they were all counted outside before they were put into the corral.

Q. Who counted them?

A. Blackmon and Niedringhaus.

Q. This time you speak of when Niedringhaus stood on one side and Marlow on the other, that was when the five hundred were counted?

A. Yes, sir. I don't think Niedringhaus and Marlow were the only men counting; there was others counting; anybody was liable to be counting. I think McNamara and Knoels were counting too; all had a hand in the counting of the horses.

Q. Knoels counting on the side of Marlow?

A. Yes, sir; he was working for Mr. Marlow.

Q. That was the time the five hundred were counted?

A. Yes, sir.

Q. At that time those that were separated and put into the other part of the corral were not counted?

A. Yes, sir; they were all counted.

Q. That was done by Niedringhaus?

A. Yes, sir.

Q. Marlow and Knoels counting on the outside?

A. I don't know.

Q. You did not count? A. No, sir.

Redirect Examination.

(By Mr. McINTIRE.)

Q. As a matter of fact the animals were all driven into the corral in a bunch, were they not?

A. Yes, sir.

Q. Did not Mr. Marlow pick out a certain animal and run it through the gate and cull them out? My understanding was that Mr. Marlow was to pick them out.

A. That was the way it looked to me he did it.

Q. Where was it Mr. Blackmon told you he had not figured, but that they had shipped less than six hundred head of cattle? A. In the old office.

Q. Can you tell when this conversation took place?

A. No, sir; but it was between the 7th and fifteenth of November, 1898.

Q. Who was present? A. No one at all.

MARTIN HAMBY.

Subscribed and sworn to before me this 27th day of January, 1899.

HENRY N. BLAKE,
Master in Chancery.

Wednesday Morning, January 25th, 1899.

THOMAS A. MARLOW, one of the complainants, being duly sworn, testified on behalf of complainants as follows:

Direct Examination.

(By Mr. H. G. McINTIRE, of Counsel for the Complainants.)

Q. 1. Mr. Marlow, give your full name?

A. Thomas A. Marlow.

Q. 2. You are one of the complainants in this action?

A. Yes, sir.

Q. 3. And a member of the firm of McNamara & Marlow? A. Yes, sir.

Q. 4. Mr. Marlow, I wish you would state the circumstances of the making of the contract set out in the bill of complaint herein, in Chicago, in May, 1898?

By Mr. CULLEN, Counsel for the Defendants.—To that we object, as immaterial, and as not within any of the issues raised by the pleadings.

By Mr. McINTIRE.—It will appear in the bill of complaint, and that is put in issue, as I understand it, that one of the inducements for the defendants to make the

contract that they did make, was this guarantee of these nine thousand head of beef cattle.

Q. 5. This contract, Mr. Marlow, calls for nine thousand head of beef steers, of the ages of three years and upwards, and the spayed heifers of four years and upwards; what have you to say as to the including of that number of animals in the contract as it was made?

A. It was one of the most essential features on our part in making the purchase of the cattle.

Q. 6. Perhaps you had better say what was said between you and the representative of The Home Land and Cattle Company with regard to that feature of the contract?

By Mr. CULLEN.—To which we object, for the reason that the contract is plain; there is no ambiguity to it, and the testimony is irrelevant and immaterial.

(Objection sustained.)

By the MASTER.—I will reserve the ruling upon that question, and pass upon it when I come to make up my findings.

A. My partner and myself met Mr. W. F. Niedringhaus in Chicago, I think, one day before the making of that contract, and had a general discussion relative to the purchase of the cattle. We went there by request, and after discussing the number of cattle that they had, and the sort of a herd it was, and so on, we finally made them an offer of twenty-three dollars a head for the cattle, as they ran, without any reference to how many beef were

in them. They didn't accept that price when it was offered, and further talk with them brought out the proposition on our part to give them two dollars a head more—twenty-five dollars a head for the cattle—providing they would guarantee a certain number of steers of three years old and upward, and spayed heifers—in other words, beef cattle in the herd. They took that under advisement some time, between themselves, and finally wanted to know how much of a guarantee we wanted, and we asked for twelve thousand head. After some further talk we finally settled on nine thousand head as the number that was to be guaranteed in the herd, and the trade was made on that basis, at twenty-five dollars per head.

By Mr. CULLEN.—We move to strike out that testimony, as being incompetent, the contract being the best evidence.

(Sustained.)

By Mr. WALLACE.—Your Honor, we are trying to contradict or vary the contract in any way.

By the MASTER.—The ruling will be reserved.

Q. 7. I will ask you, Mr. Marlow, whether you and your partner, Mr. Marlow, would have given as much as twenty-five dollars per head, the contract price for all these animals, without this guarantee of beef animals to the extent of nine thousand head had it not been incorporated into the contract?

By Mr. CULLEN.—To which we object, for the reason that the contract is plain; there is no ambiguity to it, and

the contract is the best evidence; and upon the further ground that it is leading.

(Sustained.)

By the MASTER.—Ruling reserved.

A. No, sir; we would not have given it at that time.

Q. 8. What have you to say, Mr. Marlow, as to whether you and your partner would have entered into this contract or not, except for clause nine of the same?

A. My answer to that would be that we would not have paid twenty-five dollars a head for that herd of cattle without that guarantee of that number of beef cattle.

By the MASTER.—I overruled the objection made by Mr. Cullen, on the ground that the question just asked the witness was leading.

Q. 9. When you say "that guarantee," you mean clause nine of the contract, do you not?

A. Yes, sir.

Q. 10. What, in your opinion, Mr. Marlow, would have been the value or selling price of that herd of cattle referred to in the contract without the guarantee contained in clause nine thereof?

By Mr. CULLEN.—To which we object, for the reasons already given, except as to the form of the question.

(Sustained.)

By the MASTER.—Ruling reserved.

A. My idea was that the offer of twenty-three dollars

per head that we made for the cattle without that guarantee was all that they were worth at the time.

Q. 11. That was your opinion?

A. That was our opinion, and that is all we were willing to pay.

Q. 12. Mr. Marlow, the deliveries began under this contract in 1897, did they not? A. Yes, sir.

Q. 13. Can you tell how many animals were delivered to you under the terms of the contract?

A. The total number—all told?

Q. 14. Yes, just the precise number.

A. The precise number which we received under the terms of that contract, including the strays which were shipped to Chicago, was 16,100 head.

Q. 15. Tell us what we are to understand in the cattle business, under the term "strays" as used by you in your answer to the last question, Mr. Marlow?

A. The term "strays" applies to beef cattle which were shipped to Chicago, and other eastern markets by other owners working on other ranges than The Home Land and Cattle Company's range, and for which sale money was sent back to the office of W. G. Preuitt, secretary of the association, and he in turn paid us for these direct.

Q. 16. These strays were never delivered to you direct? A. No, sir.

Q. 17. You received the money for these strays?

A. Yes, sir.

Q .18. In other words, you have given the defendant credit for it? A. Yes, sir.

Q. 19. Now, of these strays, what was the number Mr. Marlow?

A. 117 head of beef cattle, and thirty-one head of stock cattle, 148 head in all.

Q. 20. This delivery of cattle ran through the year 1897, did it, after making the contract?

A. Yes, sir.

Q. 21. Up to what time?

A. The last delivery that was made to us was on the 22d day of October, 1897, and the first on or about the first day of July.

Q. 22. Deliveries began, then, on or about July first, and continued down to October twenty-first and twenty-second, 1897; is that your answer? A. Yes, sir.

Q. 23. Had you any talks, or did you overhear any talks between any of the representatives of the defendant company, The Home Land and Cattle Company, with reference to the deliveries of October 21st and 22d, 1897?

A. With reference to the deliveries?

Q. 24. Yes, as to whether that delivery would be final —the final delivery or otherwise? A. Yes, I did.

Q. 25. With whom was such talks had, between what parties? Go ahead and qualify your answer.

A. I had some talks myself, and overheard some conversations.

Q. 26. Whom did you have any talks with, and about what time, Mr. Marlow?

A. To the best of my knowledge, about October first, when we had finished receiving the deliveries of cattle prior to this last one. I had a conversation myself with Mr. W. F. Niedringhaus, the president of the company at that time.

Q. 28. Now, go ahead and tell us what the Niedringhaus conversation was. There were two distinct talks, weren't there?

A. I am not able to state positively about that. I am inclined to think so. My recollection about that is that there were two conversations. I had a talk with Mr. Niedringhaus first and then with Mr. Blackman.

Q. 29. Tell us what the Niedringhaus talk was.

A. Personlly, I had very little talk with Mr. Niedringhaus. After the cattle were received, we were all together there. My recollection is that Mr. McNamara was there, and I think Mr. Niedringhaus. On closer recollection, Mr. Blackman was there at the same time, and the question, I think, was asked by Mr. McNamara when they would be ready for their next delivery. He said they expected to be ready on or about the 14th of October, and my recollection is that Mr. McNamara asked the question if that would be their last cattle delivery—if they expected to make that their last delivery, and Mr. Niedringhaus' answer was that it was; that they expected to have all their cattle in and to be through at that time.

Q. 30. Is that all the Niedringhaus talk with regard to the final delivery of this stock?

A. I have no recollection of the entire talk; but I am positive that it was the substance of Mr. Niedringhaus' talk, that they expected to be through at that time.

Q. 31. You say you also had a talk with Mr. Blackman?

A. No, I don't believe I personally had any talk with Mr. Blackman.

Q. 32. Well, did you overhear any talk of Mr. Blackman with others?

A. My recollection is that I heard Mr. McNamara talk with Mr. Blackman about the same time, and the conversation was just to the same effect.

Q. 33. And when did you say these conversations were had—about when?

A. My recollection is that it must have been about the first day of October. I know it was after the delivery preceding this final one, and our books show that to have been on September 30th, and October 1st.

Q. 34. I will ask you to look at that letter. (Counsel for complainants hands witness paper.) In whose handwriting is that letter, or rather, the signature?

A. The signature is that of Mr. J. C. Van Blarcum, cashier of the National Bank of Commerce of St. Louis.

(The letter referred to is admitted in evidence, without objection on the part of defendants' counsel, and is marked Exhibit "B" by the master in chancery.)

Q. 35. I hand you now, Mr. Marlow, a telegram. (Counsel for complainant hands witness paper.) Who is

Albert W. Niedringhaus, whose name is signed to that telegram?

A. Well, he is one of the various members of the Niedringhaus family.

Q. 36. Did he have any connection with the turning over of these animals on October 21st and 22d, to you?

A. Yes, sir; he did.

Q. 37. In what capacity, do you know?

A. He was there acting under a power of attorney from the National Bank of Commerce of St. Louis.

(It is admitted by the parties that Albert W. Niedringhaus, at and prior to October 21st and 22d, 1897, was the duly appointed agent and attorney in fact of the National Bank of Commerce of St. Louis, one of the defendants in this cause.)

By Mr. McINTIRE.—We offer in evidence the telegram heretofore referred to. The same is admitted without objection, and is marked Exhibit "C," by the master in chancery.

Q. 38. Now, if you will kindly tell us what was done in pursuance of, and after the receipt of the letter from Mr. Van Blarcum, and the telegram from Mr. Albert W. Niedringhaus.

(A copy of the letter referred to as being written by Mr. J. C. Van Blarcum is admitted in evidence without objection, and marked Exhibit by the master in chancery.)

A. Mr. McNamara and myself went down there on the 21st day of October, the day they stated in their tele-

gram and in their letter that they would be ready to turn the cattle over, to receive them. The first day—I think the train reached there about noon—and that afternoon they delivered one trainload of cattle to us, consisting of 626 head. That was all that could be counted out that afternoon; and Mr. McNamara, as usual, gave young Mr. Niedringhaus a memorandum receipt for that number of cattle. The next day, in the forenoon, they delivered over 307 head further to us, for which Mr. McNamara gave young Mr. Niedringhaus the usual receipt.

Question by Mr. CULLEN.—That is Albert Niedringhaus? A. Yes, sir. Albert W. Niedringhaus.

A. (Witness continuing.) That was all the cattle they delivered to us that day.

Q. 39. Now, these cattle that you have just mentioned, were delivered on what day to you?

A. 626 head on the 21st day of October—all beef cattle---and 307 head on the 22d day of October, of which 232 head were beef cattle.

Q. 40. Well, do you know whether there were any other beef cattle—three year old steers, or four year old spayed heifers, in the herd then held by the defendants at Oswego, for delivery?

A. No, sir; they told us they had taken the beef all out.

Q. 41. Who told you that? A. Mr. Blackman.

Q. 42. Who was Mr. Blackman?

A. Mr. Blackman was their range manager, or range foreman. He was in charge of all the work there, and the handling of these cattle.

Q. 43. Now, taking the beef steers that you received on October 21, 1897, and including all the beef steers received prior to that time in any of the deliveries, how many beef steers or spayed heifers of four year old and upwards did you gentlemen receive from the defendant?

A. Up to and including these two deliveries, 7,018 head, not including any strays.

Q. 44. How many strays had you received up to that time, October 21st or 22d, 1897?

A. We had received strays at that time, 113 head, of which 87 were beef.

Q. 45. Now, add these 113 head to the number you had received--

A. I want to qualify this evidence by saying, that while this entire stray list is entirely accurate, this statement may be one, two, or three out, or more than that; it may be short more than that.

Q. 46. Now, add to the number of steers and spayed heifers those you have just testified you had received, the proceeds or the number of steers that you had received up to October 21st, 1897.

A. I would say 7,105 head, and that includes the cattle received at that time.

Q. 47. And that deducted from the nine thousand head, would be how much? A. 1,895 head.

Q. 48. Now, what afterwards was done by you gentlemen on both sides at the deliveries of October 21st and 22d, 1897?

A. After the delivery of the 307 head on the 22d of October, for which Mr. A. W. Niedringhaus had taken Mr.

McNamara's receipt, Mr. A. W. Niedringhaus came to our tent, and asked Mr. McNamara for a draft in payment of these two lots of cattle—933 head. My recollection of the conversation after that was that Mr. McNamara said to Mr. Niedringhaus: "I will turn you over to Mr. Marlow; he usually does the figuring, and he will fix it up with you." He came into the tent, and I handed him a statement covering the value of the 933 head that had been delivered; I also allowed for 457 head of cattle still left in the herd, taking Mr. Blackman's count, and the number that he had given to Mr. McNamara. Allowing for 113 head of strays, and also 500 head of horses, which were to be delivered to us, making about $45,575.00 which we admitted we owed him, and from that I took these 1,895 head of beef steers that were short, at $20.00 a head, amounting to $37,900.00, which left us in debt to them $9,675.00, or about that sum, and that amount I tendered to Mr. Niedringhaus in full settlement.

Q. 49. You say you tendered; what do you mean by tendered?

A. I offered him National Bank notes, not National Bank notes, but legal tender notes, United States notes, which we took down from here for that purpose.

Q. 50. What did he say after you made this tender?

A. His answer was that he didn't know anything about the shortage proposition; that his instructions were to collect for the cattle that was delivered to us, and that he had no authority to make any settlement for any shortage that might be due us. I told him that this

was the only way we are prepared to settle, which was to pay the difference which we figured we owed them after all the deliveries were made.

Q. 51. Well, what was next done? Go on and tell it.

A. After that he went down to the store a few rods from our tent, and brought out a gentleman by the name of Sharp, who was there with him, and from that time forward Mr. Sharp took quite an active hand in the conversation all the way through.

Q. 52. Who was Sharp?

A. I asked Mr. Sharp, after I had had a few minutes' talk with him, if he was not an attorney at law, and he said he was not. I took him to be an attorney at law from St. Louis.

Q. 53. What conversation were had between you and Mr. Sharp in the presence of A. W. Niedringhaus, with Mr. Niedringhaus at that time?

A. Mr. Sharp came back to the tent, and my best recollection of the conversation now is that he was quite excited, and he said to me: "We know nothing about shortage money in any way, shape, or form. It is Mr. Niedringhaus' business to collect for these cattle that have been delivered to you people, and we expect you to pay for them. I said, "We certainly expect to pay for them, and that is what we are trying to agree upon, and I am making you this offer of what is due you." And I asked him the question, "If neither you or Mr. Niedringhaus know anything about this shortage, or who is to settle it, where are we to look for our money?" He said, "I don't know anything about that." I said: "You don't

even admit, then, that anything is due us." He said: "No, sir; we make no admissions that we owe you a cent." I also read this statement off to him, then, after this talk. Mr. McNamara was present and called in a couple of men who were working there, and I read the statement in their presence, and in their presence tendered Mr. Sharp this $9,675.00—he and Mr. Niedringhaus together. We put the money on the table for them; I was on one side of the table, and they were on the other, and they again declined to accept. At the same time that I did this, both Mr. McNamara and I made a demand on both of them, in the presence of the same two witnesses who heard the conversation, that they immediately turn over to us the 457 head of cattle that were being held just back of the tent by their men. We wanted to pay them for them and demanded that they put them into the corral. We made the tender again on that proposition, and they refused again.

Q. 54. The same thing with regard to the horses?

A. Well, after some further talk regarding the matter, they sent off after the herd of horses, and they were put into the corral, and Mr. McNamara took out 500 head, according to this contract, and I and another man that was working for us tallied them, and when we got through, Mr. Sharp says: "Now, I demand pay for these horses in money," and we again made him a tender of the same amount of money in payment for those horses, accompanied by the same statement.

Q. 55. What did he do with reference to that tender?

A. He declined that sum and ordered the horses turned back, and took them home.

Q. 56. How many horses were turned back into the corral? A. About 585 head of horses.

Q. 57. You say he ordered the horses turned back; what do you mean by that, and who did the ordering?

A. Mr. Niedringhaus and Mr. Sharp were giving orders when it got to that stage of the transaction. That is my recollection about it. We paid no further attention to what they did with the horses after they declined to accept our money, and refused to deliver them to us.

Q. 58. What was done with the 457 head of cattle remaining undelivered?

A. These cattle were held there under herd by their men until Mr. McNamara and I went to Glasgow, a short distance from there, and commenced proceedings which resulted in the receivership, and on our returning there the receiver took charge of them.

Q. 59. Can you describe this 457 head of cattle?

A. Yes, sir; I can give you a complete list of them.

Q. 60. In this list of animals mentioned in paragraph nine of the bill of complaint, state whether or not there were any calves unbranded, running with their mothers.

A. I don't know which list of animals you mean in paragraph nine.

Q. 61. The list you have just handed me.

A. Yes, sir.

Q. 62. I will ask you this question, whether or not the

animals mentioned, the 457 head of cattle, are the subject matter of this suit? A. Yes, sir; they are.

By Mr. McINTIRE.—We will offer the list referred to by the witness in evidence, being the list of 457 head of cattle undelivered on the 21st and 22d days of October, 1897.

(The paper referred to is admitted without objection, and is marked Exhibit "D" by the master in chancery.)

Q. 63. Among these animals, how many calves were there, unbranded, running with their mothers?

A. 156 head; that is my recollection about it.

Q. 64. They were unbranded, as I understand it, and running with their mothers at that time?

A. Yes, sir.

Q. 65. Did I understand you to say that the receiver of the State court took possession of these animals?

A. Yes, sir.

Q. 66. What was afterwards done with them, if you know?

A. As soon as he got possession of them, he corraled them and loaded them and shipped them to Big Sandy.

Q. 67. What disposition did he make of the animals?

A. He sold the animals to us; we purchased them of him.

Q. 68. Mr. Marlow, what was the value in October, 1897, of beef steers, three years old and upwards, and spayed heifers of four years old and upwards—beef animals?

By Mr. CULLEN.—To which we object as irrelevant and immaterial, under the pleadings in this case, there being no issue as to the value of this class of stock.

(Overruled.)

By Mr. McINTIRE.—There is an allegation of fluctuations in value, and a positive denial on your part that there was not.

By the MASTER.—Judgment reserved.

A. I should say thirty-five dollars a head all around.

Q. 69. You have been in the cattle business some time, have you not, Mr. Marlow? A. Yes, sir.

Q. 70. Were you in the cattle business in 1897, prior to the transactions here mentioned? A. Yes, sir.

Q. 71. Had you bought and sold any cattle?

A. In 1897?

Q. 72. Yes, sir.

A. We didn't sell any cattle prior to the making of this contract.

Q. 73. Not prior to October, 1897?

A. You mean prior to October, 1897?

Q. 74. Yes, sir.

A. Yes, we had both bought and sold cattle in the year 1897.

Q. 75. I will ask you if, in the purchase of cattle, you followed the market quotations, as to the price of beef steers?

A. Well, I paid some considerable attention to it.

Q. 76. It is part of your business, isn't it, Mr. Marlow?

A. Yes, sir;it is our business to watch the market prices.

Q. 77. What is the market for cattle shipped from the neighborhood of Oswego, Mr. Marlow? A. Chicago.

Q. 78. Had there been any fluctuation in the price of animals in the year 1897, and if so, what?

A. Cattle were generally enhancing in value all through the year 1897.

Q. 79. Can you tell us how much they increased in value—approximately? We don't expect you to come within a quarter of a cent.

A. I should say from five to seven dollars a head.

Q. 80. Is this for beef or stock cattle?

A. Stock and beef cattle.

Q. 81. What have you to say as to their enhancing in value during the years 1897 and 1898?

A. They have increased in value since that time.

Q. 82. So that animals in 1898 were worth more than they were in 1897? A. Yes, sir.

Q. 83. How much more—can you tell, approximately?

A. Close to ten dollars a head.

Q. 84. You said that the fluctuation in the year 1897 was from five to seven dollars a head for stock animals; can you tell us how much of this enhanced value or increase in value was subsequent to the making of this contract, and prior to October 21st, 1897?

By Mr. CULLEN.—We object to the question, for the reason that it is incompetent, irrelevant, and immaterial, and not within the issues in this case.

(Overruled. Ruling reserved by the master in chancery.)

A. How much they had increased in value between the making of that contract—

Q. 85. And October 21st, 1897?

A. Well, the larger part of it, I should say, in my opinion.

Q. 86. Can you be a little more definite in your answer?

A. Well, I should say that cattle enhanced in value five dollars a head, during that time.

Q. 87. What is your business in northern Montana, Mr. Marlow? A. Cattle business and merchandise.

Q. 88. In the conduct of your cattle business, are you in the habit, or were you, of making contracts in the years 1897 and 1898 for the sale of animals for others?

A. Yes, sir; we were engaged in making contracts during recent years with the United States Government, the Interior Department.

Q. 89. For what purpose?

A. Both for stock and beef purposes.

Q. 90. Before coming down to that contract business, tell us what was the value of calves born in 1897 and in 1898—say, in the spring of 1898.

By Mr. CULLEN.—To which we object as immaterial, and not within the issues in this case.

(Overruled.)

By the MASTER IN CHANCERY.—Ruling reserved.

A. I should say that the calves of 1897, when they had been weaned, and properly taken care of, they were cheap at twenty dollars per head in the spring of 1898.

Q. 91. Then these 156 head in the undelivered herd of 457 head of cattle, were worth what?

A. They were worth twenty dollars and over.

Q. 92. That would be what? A. $3,012.00.

Q. 93. Now, coming back to your Indian contracts, Mr. Marlow.

A. I wouldn't say twenty dollars; I would change that to nineteen dollars.

Q. 94. Change the total, then, of the 156 head of calves.

A. That would make the total value $2,964.00.

Q. 95. Coming back to your answer to the former question concerning the Indian contracts for the year 1898; did you ever have any such contracts for the year 1898? A. Yes, sir; we did.

Q. 96. In order to supply or fill these contracts, what is it necessary for you and your partner to do, Mr. Marlow?

A. We have to look to it that we have sufficient cattle to do it with.

Q. 97. And when did you do this—looking ahead for that purpose, as a rule, Mr. Marlow?

A. We were making our purchases as we did in the early spring and in the winter for spring delivery.

Q. 98. Had the animals mentioned in this undelivered herd of 457 any value for the filling of such Indian contracts as you have testified to?

A. Yes, sir; a part of them did have.

Q. 99. What have you to say as to using the same, or

any of them, in the carrying out of the Indian contracts referred to?

By Mr. CULLEN.—The testimony with reference to the Indian contracts is objected to, for the reason that such contracts are in writing, and the writing is the best evidence.

Mr. McINTIRE.—Your Honor, in this, we are not going into what the contracts are; we only desire to show that there were such contracts. There is no right asserted under those contracts.

By the MASTER.—Ruling reserved. Overruled.

A. We used a very considerable number of those cattle—the 457 head of cattle, in filling our Indian contracts this last year, 1898.

Q. 100. Can you tell us that considerable number—do you know the number you used?

A. I can tell very closely, if you will hand me that list there, so that I can have it under my eye. We used about seventy-five dry cows out of that for beef; we sold 33 bulls, about all of them on a contract of that kind, and we used all of the one and two year old heifers that are specified here for the same purpose; and also all of the 156 calves that were heifers. There was probably about half, about seventy-five head of them heifer calves we sold the next spring as yearlings on an Indian contract.

Q. 101. What is the total of that 457 herd that you used? I think you have it totaled at the bottom of that page you have there in your hand, Mr. Marlow.

A. In round numbers, we used about 350 head of that stuff. I figure it 365; I will say 350 head on the various contracts that year.

Q. 102. When you say "that year," you mean the year 1898, do you? A. Yes, sir; the year 1898.

Q. 103. In the conduct of your business up there, had you made any arrangements in the year 1897 for the handling of any animals bought under the contract set out in the bill of complaint herein?

A. Yes, sir; we did.

Q. 104. Tell us what you did do in that regard.

A. We cut large quantities of hay.

By Mr. CULLEN.—I desire to make a motion to strike out all of the testimony of the witness with reference to the Indian contracts which he had in the year 1898, for the reason that the contracts themselves are not in evidence; and it does not appear by the testimony of this witness that the firm of McNamara & Marlow had any such contracts at the date of entering into the contract which forms the basis of this action, or that these cattle were bought with reference to the contract or contracts which they had in the year 1898.

By the MASTER IN CHANCERY.—The ruling will be reserved until after the argument, and when I come to find the facts.

(Overruled.)

Q. 105. Were any of these Indian contracts in existence in the year 1897?

A. Yes, sir; our contracts for beef always ran from June to June.

Q. 106. I will ask you whether or not the Indian contracts about which you have just testified about as being filled by animals out of the herd of 457 head referred to, were in existence at and prior to October, 1897?

A. Yes, sir; they were.

Q. 107. And how far back in 1897 were they in existence?

A. All of our Indian beef contracts ran from June 30th to June 30th; from one year to another.

Q. 108. This contract which is attached to the bill of complaint is dated May 27th, 1897; were the Indian contracts referred to in existence at that time, or in contemplation at that time?

By Mr. CULLEN.—To which we object, for the reason that what was in the contemplation of these complainants, and not communicated to the defendant, could not bind the defendants in any way, or serve to increase or lessen their liability.

By Mr. WALLACE.—The question is: What special value these cattle had to the plaintiffs?

By the MASTER IN CHANCERY.—There is one part of the question to which I am inclined to sustain the objection, and that is the part which refers to what the witness had in contemplation. I will reserve my ruling as to the other portion of the question.

(Objection to contracts in contemplation sustained. Overruled as to other ground.)

A. The beef contracts were in existence at that time.

We had other contracts for stock cattle in contemplation at that time, which, later on, we secured.

Q. 109. Later on, in 1897, you secured?

A. No, sir; not until April or May, 1898.

Q. 110. Now, with reference to these Indian contracts, what had the contract that you had made with the defendant in this case to do with it?

A. What had the contract of The Home Land and Cattle Company to do with it?

Q. 111. Yes?

A. In pursuance of our general policy right along, which we followed from year to year, we were providing ourselves with stuff, in purchasing these cattle, to fill these contracts with, along with other orders which we had with them.

Q. 112. Now, a minute ago, Mr. Marlow, you said something about being prepared to winter stock in northern Montana; whereabouts in Montana had you made such preparations? A. At Big Sandy, Montana.

Q. 113. What preparations had you made?

By Mr. CULLEN.—To which we object, for the reason that it does not appear that anything relating to the preparation for the wintering of stock was communicated to this defendant at the time of the making of this contract, or that such preparations had then been made.

(Overruled.)

A. We had a great many acres of land under fence up there; we had cut large quantities of hay and stacked it, and we had bought hay along with the use of the

ranches to feed it on, from other ranchmen in that neighborhood to winter this other stuff during the coming winter—the winter of 1897.

Q. 114. I will ask you whether such hay was used in connection with the 457 head referred to after you got them. A. Yes, sir. Yes, sir, parts of it.

Q. 115. You have been some years in the cattle business, have you not, Mr. Marlow? A. Yes, sir.

Q. 116. What have you to say as to your ability to purchase or procure animals from general sources in Montana, after the 21st and 22d of October in the year?

A. I should say that it wasn't possible to get them.

Q. 117. Why not?

A. Because it is too late to round them up, or to get hold of them or handle or ship them. It is too late, in other words, to get them off the range. It is not customary for anybody to sell or deliver them—range stock --after that time of the year.

Q. 118. Were those the conditions in 1897?

A. Yes, sir; applied to that year as much as to any other year.

Q. 119. Mr. Marlow, what efforts have been made by the parties to this contract to carry out the terms thereof subsequent to October 21st and 22d, 1897?

By Mr. CULLEN.—To which we object, for the reason that the pleadings and the testimony shows that the complainants broke the contract October 21st and 22d, 1897; and that there was no obligation on the part of the defendant to further perform the contract on its part.

By the MASTER IN CHANCERY.—I will reserve the ruling.

(Overruled.)

A. When you speak of the contract—the parties to the contract—you mean both parties, don't you?

Q. 120. Yes, sir; both parties.

A. We notified them on the 30th of May, 1898.

Q. 121. How did you notify them?

A. Notified them by letter.

Q. 122. By registered letter?

A. Yes, sir; I will say a letter, of which I produce a copy, notifying them that we were prepared to receive the remainder of the cattle, or such numbers as they could gather, under the terms of that contract for 1898, and that we expected them to gather the cattle according to the contract.

(The letter referred to by the witness is offered in evidence by complainants' counsel, admitted without objection, and marked Exhibit "E" by the master.)

Q. 123. Did you receive any answer to that letter?

A. After some time I did receive an answer to it.

Q. 124. Is that the answer? (Counsel hands witness paper.)

A. Yes, sir; this is the answer.

By Mr. WALLACE.—We will offer this letter in evidence.

(It is admitted without objection, and marked Exhibit "F" by the master in chancery.)

(Witness continuing.) I will further, in answer to that. say: That in that letter The Home Land and Cattle Com-

pany have made no effort whatever, or any offer, to carry out their part of that contract, for the season of 1898.

Cross-Examination.

(By Mr. W. E. CULLEN, Sr., of Counsel for the Defendants.)

Q. 1. The contract here in controversy was made in Chicago, was it not? A. Yes, sir.

Q. 2. How long had you been there prior to the time the contract was made?

A. I am not positive, Judge; either one day or two days. In all, stayed two days, I think, and only one day prior. I think we got through on the morning of the 26th.

Q. 3. Was Mr. Niedringhaus there when you arrived?

A. No, sir; I don't think he was; I think he got there a short time afterwards—the same day. That is my recollection.

Q. 4. Had there been any previous understanding or agreement as to meeting in Chicago for this purpose?

A. Yes, sir.

Q. 5. When did the negotiations for the purchase of these cattle first commence?

A. The first talk about that began between ourselves and one of the Niedringhauses at Miles City, during the Stockgrowers' meeting there in the spring; I think it was the 14th of April. That wasn't a negotiation, however; it went no further than his saying to us that he thought his people would like to sell these cattle. There was

some discussion as to how many they had. He was sick at the time.

Q. 6. You and Mr. McNamara were together in Chicago? A. Yes, sir; we went there together.

Q. 7. Was there anyone besides Mr. Niedringhaus representing The Home Land and Cattle Company present at the time this contract was made?

A. Yes, sir; Mr. Niedringhaus' son; George, his name is. It is on the contract as a witness, I think. It looks like George H. He is a son of W. F. Niedringhaus—George H. Niedringhaus. I don't know whether he was an officer of the company; he took an active part in the talk, just as much as his father did, relative to the cattle.

Q. 8. About how long after you arrived did the Niedringhauses arrive in Chicago, as far as you know?

A. I couldn't tell you. We met them at the office of Rosenbaum Brothers, at the Stockyards. We went to Rosenbaum's office the day we got there, and they probably got there the same morning. Our arrangement was to meet them in Rosenbaum's office. I don't know when they got there; that is when we first met them.

Q. 9. About what time of the day was it when you first met them at Rosenbaum's office?

A. I should think about ten or eleven o'clock in the forenoon.

Q. 10. How long was it after you first met them, before you reached an understanding, and had agreed upon the terms of your contract?

A. My recollection about it is that we met them there between ten and eleven o'clock in the forenoon. We had some preliminary talk, and then we all went to lunch together, and some time later that afternoon we agreed on a trade. I think, though, the contract wasn't written out until the next day.

Q. 11. Then your recollection is that an agreement was reached on the 26th of May, and the contract was written up on the 27th, is that correct, Mr. Marlow?

A. Yes, sir; that is my recollection of it now, as well as I can remember.

Q. 12. That is what you think about it, is it?

A. Yes, sir; I think it was written up the same day that we made the agreement, written up preliminary, and the next day we went up there and got them typewritten and signed.

Q. 13. By whom was that contract drawn?

A. We drew it ourselves. I sketched the contract out with a lead pencil, and submitted it to them, and they looked it over and altered a few little points in it, and I finally dictated it to a stenographer in an office there, and it was typewritten.

Q. 14. When was the first delivery of catle made by the defendant under this contract?

A. The first of July, I think. On or about the first day of July; yes, sir.

Q. 15. How many cattle were then delivered?

A. 249 head that went to Fort Peck on an Indian beef contract. Shall I specify what was steers in that bunch?

Q. 16. Yes, sir.

A. 188 head of them were steers.

Q. 17. Well, I don't care so much about that. That is the total delivery made at that time? A. Yes, sir.

Q. 18. When was the next delivery of cattle made under this contract, Mr. Marlow?

A. On the eleventh day of July, 1897?

Q. 19. How many were then delivered?

A. 1,477 head of stock cattle shipped to Big Sandy.

Q. 20. When was the next delivery made under this contract?

A. The 20th day of July, 1,409 head of steers—of stock cattle, I should say, instead of steers.

Q. 21. Why were those cattle shipped to Big Sandy?

A. Everything but the beef in that herd we shipped home and turned them out on our own range to take care of them.

Q. 22. The home ranch of McNamara & Marlow is at Big Sandy? A. Yes, sir; at Big Sandy.

Q. 23. When was the next delivery?

A. The 29th of July, 679 head of stock cattle shipped to Big Sandy.

Q. 24. When the next delivery?

A. August 12th, 507 head of steers went to Chicago.

Q. 25. The next delivery?

A. The 14th of August, 483 head of steers.

Q. 26. Give the subsequent shipments up to October 21st, of what character, and where shipped.

A. The same date 476 head of steers, shipped to Chicago. The same date, 60 head of stock cattle to Chicago; August 15th, 528 head of steers to Chicago; August 15th,

490 head of steers to Chicago; August 15th, 37 head of stock cattle to Chicago; August 13th, 537 head of stock cattle to Big Sandy; August 13th, 281 head of steers to Big Sandy. August 18th to the 22d, 639 head of stock cattle to Big Sandy; 519 head of stock cattle to Big Sandy; 19th and 20th 1,434 steers and 1,212 head of stock cattle; September 2d, 507 steers to Chicago; September 3d, 203 head to the same place; September 3d, 304 head of stock cattle to the same place; September 4th, 308 steers to Chicago; 200 head of stock cattle to the same place; September 4th, 829 head of stock cattle to Big Sandy; September 30th, 521 steers to Chicago; October 1st, 343 head of stock cattle to Chicago; same date, 209 steers to Chicago; October 2d, 25 steers to Big Sandy; same date, 550 head of stock cattle to Big Sandy.

Wednesday afternoon, 2 o'clock.

Hearing resumed after recess.

Q. 27. How many cattle under this contract had been delivered and paid for prior to October 21st, 1897?

A. 15,019 head.

Q. 28. How were those divided, as to being stock cattle or otherwise?

A. 6,160 head of steers; the balance stock cattle.

Q. 29. How many strays had been received by you prior to that time, Mr. Marlow?

A. No payments were made on the strays until the end of the season. I allowed for these strays on the 22d of October, all that we had returns for at that time. I can give you that, if you wish it.

Q. 30. How many strays had you returns for prior to October 21?

A. Up to October 21st, 113 head. As I said before, in giving that testimony, it is possible I may have erred by two or three head; not to exceed that, though. 87 steers and 26 stock cattle, is what I reckon it at.

Q. 31. How many strays have you received on account since October 21st 1897?

A. Enough to make, all told, 148 head. All we have received. 117 steers and the rest stock cattle.

Q. 32. Were you present in person at all of these deliveries that were made prior to October 21st?

A. No, sir; I was not.

Q. 33. Were you present at any of them, and if so, what ones?

A. I was present at the deliveries of September 30th, October 1st, and October 2d, and October 21st and 22d.

Q. 34. Other than the deliveries which you have just mentioned, who represented The Home Land and Cattle Company in delivering these cattle?

A. Mr. McNamara, all of them. He was present at every delivery that was made.

Q. 35. How many cattle were delivered September 30th? A. September 30th, 521 head of steers.

Q. 36. How and to whom was payment made for that delivery, if you remember? A. September 30th?

Q. 37. Yes, sir.

A. Payment was made for all of these cattle at the National Bank of Commerce of St. Louis, Missouri, by draft or orders on Rosenbaum Brothers of Chicago.

Q. 38. To whom did you deliver that draft?

A. Of September 30th?

Q. 39. Yes, sir; who represented The Home Land and Cattle Company on this delivery of September 30th?

A. Who represented them?

Q. 40. Yes.

A. Mr. W. F. Niedringhaus, the president of the company, was there in person.

Q. 41. Now, on the other two deliveries that you have mentioned, when were you present—when you were present in September, who represented the company?

A. No one.

Q. 42. October, I should say.

A. October first and second? Mr. W. F. Niedringhaus, on both occasions—on all three of these deliveries.

Q. 43. How many cattle were delivered October second?

A. 575 head; 550 head of stock cattle, and 25 steers.

Q. 44. What was about an average trainload lot of cattle, Mr. Marlow?

A. Well, these all represent trainloads of cattle as they run along here. These figures that I have given in the neighborhood of 500 head, as low as 476 head, 483 head, 519, to as high as 639, according to the cattle.

Q. 45. And the number of cars?

A. That you happened to have on hand, and the kind of an engine you had to pull them.

Q. 46. No objection was ever made to any of these deliveries, on account of there not being a trainload of cattle; they were all received, were they?

A. Yes, sir; all received; there was no objection made, to my knowledge.

Q. 47. You have testified about the conversation that you had with Mr. Niedringhaus October first, 1897; where did that conversation occur? A. At Oswego.

Q. 48. Whereabouts at Oswego?

A. Around about the Indian traders' store at the corrals, or up towards our tent, which was a few steps around away from there.

Q. 49. You are not able to state exactly where it did occur? A. No, sir.

Q. 50. Now, if you are not able to say, Mr. Marlow, where this conversation occurred, how are you able to state who was present at it, aside from Mr. Niedringhaus? A. How am I able to tell?

Q. 51. Yes, sir. A. Well, I remember that.

Q. 52. Who else was there?

A. Mr. Loss Blackman was there.

Q. 53. Was he present or within hearing?

A. We were all present during these talks.

Q. 54. Mr. Blackman was where he could hear this conversation that took place between you and Mr. Niedringhaus? A. My recollection is that he was; yes.

Q. 55. Which Niedringhaus was this that you had this conversation with? A. W. F. Niedringhaus.

Q. 56. Was there any other Niedringhaus there, except W. F. at that time?

A. The young man—as the boys call him, Ab.—was around, more or less, all the time. I wouldn't under-

take to say whether he was there when we were talking about this next delivery of cattle or not.

Q. 57. How did the conversation commence?

A. Commenced, as well as I can recollect, by Mr. McNamara asking Mr. Niedringhaus when they would be ready with their next delivery of cattle.

Q. 58. Didn't they have their next delivery of cattle right there? A. Certainly, they did not.

Q. 59. Where did the cattle come from that were delivered the next day?

A. There were no cattle delivered the next day, October third. I said in my testimony I was there when we were through receiving the cattle. I didn't specify to the date.

Q. 60. Do you know on which date it occurred?

A. I know as well as I know the date of any deliveries.

Q. 61. Then it must have been on the second day of October?

A. On the second day of October; a man cannot go back and spot onto these dates exactly; but that is my recollection of it.

Q. 62. What was Mr. Niedringhaus' reply?

A. That they expected to be ready with their next lot of cattle on the 14th.

Q. 63. Anybody else have anything to say about it, except Mr. McNamara, Mr. Niedringhaus and Mr. Sharp?

A. I don't remember whether Mr. Blackman had anything to say about it or not. Mr. Niedringhaus was the head man there.

Q. 64. And at that time Mr. Blackman didn't have anything to say about it?

A. I don't think he had anything to say about it at that time.

Q. 65. Did that end the conversation, or did Mr. Mc Namara make a reply?

A. I don't remember exactly as to that. I don't remember whether he said he expected it to be the last delivery or not. Mr. McNamara asked the question whether that would be the last delivery or not.

Q. 66. And what did Mr. Niedringhaus say?

A. Mr. Niedringhaus said, "Yes," they expected to get through this next delivery. He made a talk, I remember, on this delivery. He said, "Will you take all the steers on this delivery that we are ready to clean up, those that you have been throwing back for this last month or two?" And Mr. McNamara says, "Yes."

Q. 67. What steers were those?

A. There is a clause in that contract which says that we are not compelled to receive any of these beef cattle until such time as they were beef and fit to ship to Chicago. A number of these deliveries were made there with a good many thin cattle which were brought in, and that Mr. McNamara did not consider were fit for beef, and he threw them out, and he put them out, and turned them back. That is some that these boys had reference to yesterday.

Q. 68. About how many of these steers had been held in that way?

A. I couldn't say now. I didn't take such an interest in them as to know how many there were of them.

Q. 69. When did you reach Oswego, when you went down to receive these cattle?

A. On the 14th, the day they were to be given to us.

Q. 70. Did you remain there until the 21st?

A. No, sir; I should say we didn't; the train came back west that night.

Q. 71. Where did you go to then?

A. Came back to Big Sandy.

Q. 72. When did you reach Oswego, when you went down to receive the cattle on the 21st?

A. When did we reach there?

Q. 73. Yes, sir.

A. On the 21st. My recollection is the 21st.

Q. 74. Mr. McNamara was with you?

A. Yes, sir.

Q. 75. Who else—who was accompanying you?

A. Just ourselves.

Q. 76. Anyone else? A. No one, that I know of.

Q. 77. Didn't you have a foreman there?

A. We had a couple of men there in our employ all summer. They stayed there all the time.

Q. 78. Who made the delivery on the 21st, on behalf of The Home Land and Cattle Company, the defendant here?

A. What do you mean by who made the delivery?

Q. 79. Who was representing The Home Land and Cattle Company on that delivery?

A. That is a hard question to answer. I don't think anybody was representing them. Mr. Blackman might have been representing them. Mr. Niedringhaus was delivering cattle by authority of his power of attorney from the National Bank of Commerce of St. Louis. Mr. Blackman was assisting in that capacity, probably.

Q. 80. Mr. H. L. Niedringhaus was there?

A. Yes, he was around; if that is the man that is referred to. He took no hand in the delivery of the cattle, that I knew of, at any time.

Q. 81. When did you first see Mr. H. L. Niedringhaus?

A. On or about the 14th of October, or the first day when we went down to receive the cattle, or when we expected to receive them.

Q. 82. He was there then?

A. He got there on the train that reached there in the afternoon. He got off the train, and we had a few minutes talk with him before we got on again.

Q. 83. Now, on that day did Mr. A. L. Niedringhaus and Mr. H. L. Niedringhaus leave there together, a couple of hours after you got there?

A No, sir; my recollection in the matter is that Mr. A. W. Niedringhaus came there, and met us there during the afternoon of the 14th. I don't know any Mr. A. L. Niedringhaus.

Q. 84. Did you see Mr. H. L. Niedringhaus on the 21st?

A. Yes, sir; I wouldn't be sure that I saw him that day.

Q. 85. What time was the delivery of the cattle commenced on that day, Mr. Marlow?

A. Along about the middle of the afternoon; about five o'clock, I should say.

Q. 86. Where were the cattle that were delivered when you got there?

A. They were out north of Oswego, the herd itself, about three or four miles from town.

Q. 87. There are cattle yards at Oswego?

A. Yes, sir.

Q. 88. The cattle that were to be delivered were driven into the cattle yard? A. Yes, sir.

Q. 89. And as they were delivered driven onto the cars? A. Yes, sir.

Q. 90. Now, was the 626 head that you got on that day in the cattle yard, when you arrived there, Mr. Marlow? A. No, sir.

Q. 91. They were out back of the tent, were they?

A. They were out in the herd.

Q. 92. They were driven in, then?

A. Yes, sir; brought in and put in the corral after we got there.

Q. 93. When were the steers or beef cattle cut out of this herd that was being held there—was that done on the 21st?

A. I couldn't say whether they had those cut out when we got there, or whether it was the day before we got there; but I believe they went out and got the steers after we got there.

Q. 94. How long did the delivery take? It commenced in the middle of the afternoon, and finished when?

A. Sometime about when it was getting dark; six, half-past six, or seven o'clock. Something like that.

Q. 95. Did you hear Mr. A. W. Niedringhaus say anything about payment for those cattle that day?

A. No, sir; I did not.

Q. 96. What did he say with reference to the delivery that evening, after it was concluded?

A. That I couldn't say.

Q. 97. Not after it was concluded?

A. I don't think he said a word he went out to the tent with Mr. McNamara, and he wrote a receipt and handed it to him, and there was nothing said about it.

Q. 98. Did you go to the tent with Mr. McNamara?

A. Yes, I believe I was in the tent when he handed it to him.

Q. 99. Did you hear any conversation between the two gentlemen at that time? A. Yes, sir.

Q. 100. What was it?

A. I heard Mr. A. W. Niedringhaus say: "We can fix this up in the morning, Mac, when you get these other cattle that are to be delivered."

Q. 101. Where was this bunch of cattle shipped to?

A. Big Sandy.

Q. 102. Had you had any conversation with Mr. Niedringhaus before that, as to where you were going to ship them to, after the delivery? A. I did not.

Q. 103. Well, did you have any talk, or was there any talk in your presence about that?

A. No, sir; none at all.

Q. 104. He knew, then, that these cattle were to be shipped to Big Sandy, didn't he?

A. No, sir; I don't think he did.

Q. 105. Nothing said about it?

A. There was not in my hearing, to my knowledge; nothing said about where the cattle were going to.

Q. 106. Now, on the following morning, about what time did the delivery commence?

A. Well, we got out there pretty early the next morning; as soon as the boys could get breakfast and get to work; quite early. That time of the year, I should say between five and six o'clock in the morning.

Q. 107. In the morning? A. Yes, sir.

Q. 108. Where were the cattle when you got out there?

A. The cattle were still out back of the tent, some four or five miles, where they had been holding them, out north.

Q. 109. How long did it take to get them driven back into the stockyards?

A. They were not driven to the stockyards that day.

Q. 110. Where were they delivered?

A. They were cut out of the herd, three hundred and seven head were cut out, and tallied as the boys cut them. We put our boys in charge of them and started them to Fort Peck on a beef contract that we had there.

Q. 111. You didn't put them on the cars at all?

A. No, sir; they were delivered right to the herder.

Q. 112. How far away from the other bunch of cattle, from the beef steers, if you noticed?

A. Which other bunch?

Q. 113. The bunch which you afterwards put into the hands of the herders?

A. We all went out that morning and helped to cut the steers and tally them.

Q. 114. So you cut steers right out of that herd?

A. Yes, sir.

Q. 115. After those beef steers were delivered, was anything said about payment for the deliveries that had theretofore been made, and if so what?

A. Mr. Niedringhaus came down to the tent just after these cattle had started for Fort Beck, and asked Mr. McNamara for a draft in payment for the cattle—the two lots.

Q. 116. You had gone down to the tent ahead of him, had you?

A. Yes, Mr. McNamara and I went back to the tent, and Mr. Ab. Niedringhaus came behind us.

Q. 117. The tent was four or five miles from where you had received the cattle, was it, Mr. Marlow?

A. Yes, sir.

Q. 118. What time was it when you got back to the tent?

A. Well, it was still early in the forenoon; might have been nine or ten o'clock.

Q. 119. When you were out there, was anything said

about driving in the balance of these cattle and delivering them? A. No, sir.

Q. 120. The beef steers was all you wanted on that 22d day of October, was it?

A. No, sir; we calculated to get the balance of the cattle out; we had expected to.

Q. 121. Mr. Niedringhaus found you and Mr. McNamara in the tent when he arrived there?

A. Yes, sir; around there.

Q. 122. What did Mr. McNamara say to him when he demanded pay for these deliveries?

A. My recollection of what he said to him was: "I will turn you over to Mr. Marlow; he does the figuring, and he will fix it up with you." Something to that effect.

Q. 123. Mr. McNamara remained there in the tent?

A. Yes, sir.

Q. 124. How did it happen, Mr. Marlow, that you had gone down there with this legal tender currency, ready to make this payment? A. how did it happen?

Q. 125. Yes.

A. We considered that we had had pretty good notice served on us that they were going to rob us. When we went there the 14th day of October, to receive the cattle (and they had agreed to gather them for us, and the cattle were all gathered there as they had agreed to) they declined to deliver them to us, without any reason for not doing so, or to give us any satisfaction as to when they would deliver them to us; and a few days after that we received a copy of this power of attorney from the

National Bank of Commerce of St. Louis to A. W. Niedringhaus, to deliver the cattle and receive the drafts; we thought we had ample notice that the company didn't intend to pay us for this shortage.

Q. 126. All of these payments had been made to the bank before that, had they? A. Yes, sir.

Q. 127. You knew that the National Bank of Commerce was the assignee of this contract?

A. Yes, sir.

Q. 128. Now, what was there in the mere fact that they had given Mr. A. W. Niedringhaus a power of attorney to excite your suspicion?

A. Mr. A. W. Niedringhaus had never acted as their attorney; the people had been out there themselves turning over the cattle, and I think Mr. W. F. Niedringhaus, the president of the company, had been out there himself at every delivery. I was only there twice myself.

Q. 129. Wasn't it three times?

A. Well, just twice. And the fact that they hadn't delivered these cattle on the 14th of October, and that they were through with the round-up and they declined to give us any reason why they wouldn't turn them over, I think we had every reason to be suspicious.

Q. 130. What reason was given for not delivering them on the 14th of October, Mr. Marlow?

A. None whatever; none at all.

Q. 131. Who did you have any conversation with on the 14th of October, about the cattle?

A. Mr. H. L. Niedringhaus.

Q. 132. Where did that conversation take place?

A. Right on the platform at the station at Oswego when the west-bound train pulled in. Mr. Niedringhaus got off of that train.

Q. 133. Well, what conversation did you have?

A. The conversation was about this: Mr. McNamara says to him, "Are you ready to turn these cattle over?" and he says, "No, we are not." Mac. said: "When will you be ready to turn them over?" and Mr. Niedringhaus says: "I don't know when we will be ready to turn them over." Mr. McNamara then says: "I understand you are through gathering"; and Mr. Niedringhaus said in response to that: "No, I cannot tell you anything about that." It is a flag station, and the train only sops there a few moments—the passenger train—just long enough for a person to step on or get off. Then Mr. McNamara says: "When will you deliver these cattle?" and he says, "I don't know; I will write to you, or come and see you in two or three days," and that is all that was said.

Q. 134. How long had you been at Oswego at the time this train got in there?

A. At the time the west-bound train got in?

Q. 135. Yes, sir.

A. I think we had lunch on the train that day; probably got there at half-past twelve or one o'clock. The other train came along about six or seven o'clock.

Q. 136. The train was late that day?

A. I don't remember about that. I think that is the time it arrived; I don't remember exactly.

Q. 137. Well, between the time you reached Oswego

and the time when you had this conversation with Mr. H. L. Niedringhaus, who had you seen representing this defendant there? A. I had seen Mr. Blackman.

Q. 138. Where did you see him?

A. Right there; right there around the store and the station.

Q. 139. Have any talk with him?

A. Mr. McNamara had talked with him; that I remember.

Q. 140. Whereabouts?

A. Oh, I cannot say right where. Perhaps in front of the store or in front of the tent, or at the station.

Q. 141. What was said?

A. Mac. said, "When are you going to be ready to turn over the cattle," and he says: "I don't know anything about when we are going to turn them over." I heard Mr. McNamara say to him: "Are you through rounding up," and he says: "Yes, we are through except around the bends of the river, and a few cattle that have broken away."

Q. 142. Was that all of that conversation?

A. That is all I recollect of it now.

Q. 143. Did you see anybody else there, representing The Home Land and Cattle Company, except Mr. Blackman from the time you arrived, to the time Mr. Niedringhaus came back?

A. Yes, saw Mr. A. W. Niedringhaus there that day.

Q. 144. Have any talk with him about it?

A. Nothing to amount to anything. He didn't have

any power of attorney then, and wasn't talking very much.

Q. 145. So then, in consequence of the refusal of Mr. Niedringhaus to deliver the cattle on the 14th of October, and the fact that the National Bank of Commerce had given Mr. A. W. Niedringhaus a power of attorney, you concluded it was best for you to go down there with this currency?

A. Yes, we thought we had better go down there with this currency.

Q. 145. Now, after Mr. McNamara turned Mr. Niedringhaus over to you, what took place between you?

A. Had a talk relative to the delivery of these cattle. The first thing that took place between us was, I sat down to the table and wrote out a statement, of which this is a copy. (Witness refers to paper), but which may not exactly jibe with the statement I gave him—that is, it may differ in some immaterial particulars. In other words, it is a copy of the statement that I gave him that day.

Q. 146. When was this statement that you have produced made out?

A. Made out right there. That one there, I just made that up yesterday. I got it out of this record book. (Witness refers to book in his possession.)

Q. 147. But it was a statement substantially like that?

A. Yes, except it might have had a few stray cattle, more or less, in it.

Q. 148. Did you count out the money to him that you agreed by your statement was due him?

A. No, sir; I put it in a bundle in front of him and asked him to count it; he refused to touch it, or to have anything to do with it.

Q. 149. You counted it out at the bank?

A. Yes, sir; I counted it when I took it away from here. I had a bundle of ten thousand dollars, and I counted it here and when I got down there; and when I got there I took three one hundred dollar bills out of it, which made it $9,700.00.

Q. 150. Mr. Niedringhaus, as I understand you, went off and got Mr. Sharp?

A. Yes, sir; and he said he couldn't accept any such settlement as that; said he knew nothing about such a shortage, and went down about three hundred yards to the traders' store there, and came back with Mr. Sharp.

Q. 151. Was anything said between yourself and Mr. Niedringhaus with reference to the number of strays that had been delivered to you and paid for?

A. I don't remember any talk about the strays; they were there as stated in the statement.

Q. 152. They were stated in the statement?

A. Yes, sir.

Q. 153. Don't you remember that in that conversation with Mr. McNamara, Mr. Niedringhaus claimed that your statement didn't show the same number of stray cattle that they were entitled to credit for?

A. No, sir; I remember Mr. Sharp did: Mr. Niedringhaus didn't say anything about it.

Q. 154. Mr. Niedringhaus said nothing like that?

A. No, sir, Mr. Sharp did.

Q. 155. How long afterwards did Mr. Sharp make an appearance?

A. Right after this, as soon as A. W. Niedringhaus could go down to the store and back again.

Q. 156. Mr. Sharp came back with Mr. Niedringhaus?

A. Yes, sir.

Q. 157. Mr. Ab. came with him?

A. Yes, sir; I think he did—I said he came up; I am positive.

Q. 158. Where was your cook and herder at this time, that you had called to witness this transaction?

A. Right around there in the tent. The cook was working there about the tent.

Q. 159. Well, when Mr. Sharp came up, what took place between you?

A. About the same talk that took place with Mr. Niedringhaus, that they couldn't recognize any such settlement as that. Mr. Niedringhaus was there with a power of attorney to collect the money for these cattle, he said, and wouldn't accept any proposition of that kind; expected us to pay him in full.

Q. 160. In full for the cattle as delivered?

A. As delivered, yes. The cattle had been delivered the day before and that morning receipts accepted, and they said they expected we would give them a draft for the cattle, and they expected that kind of a settlement.

Q. 161. And you declined to pay?

A. I declined to pay, except that tender that I put before him, the moment he came into the tent.

Q. 162. That is, before Mr. Sharp?

A. Yes, sir; as soon as he came in there.

Q. 163. What further was said about this matter that you recall, Mr. Marlow?

A. That was all that was said about it.

Q. 164. Did he say anything about your having broken your contract?

A. Yes, after we got through, he served formal notice on us to the effect that we had broken our contract. Then I called the boys' attention to the fact, and I made the tender of the money, counted it out there on the table, and Mr. Sharp, I remember very well, lost his temper, and swept the money across the table with the back of his hand.

Q. 165. Didn't want it.

A. No, didn't want it; and then I made a demand on him that he bring in that 457 head of cattle and put them in the corral, and turn them over to us, which he declined to do. I asked him about the shortage, and he said: "We know nothing about this shortage matter; that is a matter to be adjusted somewhere else, or some other time. We expect payment for the cattle." I said, "If you don't know anything about it, who do we look to? You represent these people." He says: "We don't represent them in any such business as this," or words to that effect. I says: "You admit that you represent them for the purpose of getting the money and taking receipts for them." And he says: "I don't deny or admit any-

thing with reference to it. I am here to get this money for the cattle." There was a great deal more said, but that was the sum and substance of it.

Q. 166. What time of the day was it that this took place?

A. Well, I should say about noon. It was right after we got these Fort Peck cattle started off.

Q. 167. And you don't know how long it took to cut these cattle out and get them started?

A. Oh, some time.

Q. 168. Now, at that time where were the horses, at the time this conversation was going on?

A. The horses were all over the river, except those that Caldwell was using to hold this bunch of cattle.

Q. 169. What time of the day was it when these horses were driven in?

A. I think two or three hours after this talk; a couple of hours, maybe, after lunch.

Q. 170. Where were the horses put when they were driven in? A. In the stockyards.

Q. 171. Did you count the horses that were driven in?

A. When the horses were put in?

Q. 172. Yes. A. I did not; no, sir.

Q. 173. Did you count the entire band at any time?

A. No, sir; I did not.

Q. 174. How are you able then to testify that there were 580 head of horses?

A. I have not testified that there were 580 head; I testified there was about that.

Q. 175. How did you ascertain that?

A. I ascertained it in this way: While Mr. McNamara was taking our horses out, they were running them from one division to the other, and Mr. McNamara was turning out what we didn't want, and Mr. Knoell and I were tallying the horses that we wanted until we had tallied five hundred head. After we got through there was a little bunch left, and Herman Knoell got on top of the fence and counted them, and I saw Ab. counting them too, and we all made about the same 80, 81, 82, or a little over.

Q. 176. They didn't pass through a gate or anything?

A. Not the 81 odd head; the others did. I counted them myself.

Q. 177. Well, were there 81 or 85 head?

A. Well, from 81 to 85.

Q. 178. Was there a hundred head?

A. No, sir.

Q. 179. You are certain of that?

A. I am as certain of that, as I am that I counted the 500 head, myself.

Q. 180. Now, what time of the day was it when you got through counting these horses?

A. It was along in the afternoon, if I remember right; two o'clock, I guess; three, maybe.

Q. 181. How far is it from Oswego to Glasgow?

A. About twenty-eight or thirty miles.

Q. 182. What time was it when you started to Glasgow?

A. Started up there about the middle of the afternoon.

Q. 183. Well, you were counting these horses in the middle of the afternoon?

A. Yes, sir; we started as soon as we got through counting the horses.

Q. 184. You had gone down there with papers prepared, had you not, for a lawsuit?

A. No, sir; we had not.

Q. 185. Had you your attorneys with you there?

A. Had an attorney at Glasgow, yes, sir.

Q. 186. Well, the papers were all drawn up when you got to Glasgow?

A. No, sir; I think not; I never saw any.

Q. 187. Didn't see any? A. No, sir.

Q. 188. How long did you remain in Glasgow?

A. When we went back?

Q. 189. Yes. when you went this time and commenced this suit?

A. Maybe an hour and a half or such a matter; possibly two hours, or not over an hour. I don't remember now.

Q. 190. In the meantime you got out the papers for this suit?

A. The papers were all ready when we got there.

Q. 191. You filed them and had them served that same day, did you not, Mr. Marlow? A. Yes, sir.

Q. 192. Now, your attorneys had gone down to Glasgow for this purpose, had they not?

A. Our attorney had gone down there to protect our interest; he had no papers when he left here. Went to do whatever seemed best for our interests.

Q. 193. Well, when were the cattle put into the hands of Mr. Knoell, as receiver?

A. The papers were served--we got back there after dark that night.

Q. 194. The papers were served that night, were they?

A. I am not positive whether they were served that night or in the morning. The cattle were turned over to Mr. Knoell, if I remember right, quite early the next morning.

Q. 195. What did he do with them?

A. Brought them into the stockyards at Oswego.

Q. 196. On the 23d? A. Yes, sir; on the 23d.

Q. 197. And shipped them immediately to Big Sandy?

A. Yes, sir; he did.

Q. 198. How long after that had they sold them to McNamara and Marlow?

A. Sold them to us right there.

Q. 199. On the 23d of October?

A. We made a bargain with him for the cattle, and told him what we would give him for them.

Q. 200. So when they reached Big Sandy they were the property of McNamara and Marlow, were they?

A. They were, yes, sir.

Q. 201. What did you give to Mr. Knoell?

A. Twenty-five dollars a head.

Q. 202. The same as you had agreed to pay The Home Land and Cattle Company for them? A. Yes, sir.

Q. 203. Now, I believe you say the market for cattle

around in the vicinity of Glasgow and Oswego, and so forth, is Chicago?

A. Yes, sir; practically all the cattle go to Chicago.

Q. 204. The Chicago market really fixes the value of cattle? A. Yes, sir; I suppose it does.

Q. 205. Well, does it?

A. Yes, fixes the price for beef cattle.

Q. 206. What was the market value in Chicago of beef cattle on the 21st and 22d of October, 1897?

A. For these beef cattle?

Q. 207. No, for beef cattle?

A. Out of that herd?

Q. 208. Well, out of any herd; what would they be quoted at in Chicago?

A. Steers and spayed heifers out of that herd were worth from thirty-eight to forty dollars a head; somewhere in that neighborhood.

Q. 209. How long prior to that time had you shipped a trainload of these cattle to Chicago?

A. Prior to the 21st of October?

Q. 210. Yes, sir; you didn't ship any of these cattle that you got on the 21st?

A. We shipped cattle out of that herd to Chicago on the 30th of September, and the first of October.

Q. 211. What did you get for them?

A. Along about that price. I wouldn't be positive about that. I can go to my office and bring you the exact figures of what we got for them, in dollars and cents.

Q. 212. Do you remember what you got for any of

the shipments that you made out of that herd in Chicago? A. Absolutely?

Q. 213. Absolutely.

A. No, sir; that is too big a job; I don't pretend to know. That is too many cattle.

Q. 214. Well, can you state about what you got for any of these shipments?

A. Well, I would rather bring an account of sales that I have got, and tell you exactly.

Q. 215. How long have you been shipping beef to Chicago, Mr. Marlow?

A. About nine years. I have been interested in cattle, and shipping to Chicago about that length of time. I think I first got interested in the cattle business in 1889.

Q. 216. During the season of 1897, about how many shipments did you make to Chicago?

A. About how many?

Q. 217. Yes, in round numbers.

A. I couldn't tell you. I had never been at Big Sandy to stay there all the time until about the tenth of September, 1897, when I left the Montana National Bank. Mr. McNamara made the shipments, and I couldn't tell; the books will tell, but I cannot tell from recollection.

Q. 218. But after September, 1897, you went to Big Sandy and made that your headquarters?

A. Yes, sir; I have been there most of the time.

Q. 219. Do you recall what was about the average price of beef in Chicago, during the month of September, 1897? A. By the hundred pounds?

Q. 220. Any way.

A. No, sir, I cannot. I would rather give you the exact figures.

Q. 221. Now, after October 21st, when did you make the next shipment of cattle?

A. Didn't make any more out of that herd.

Q. 222. Well, any herd?

A. Well, made some more from Big Sandy.

Q. 223. You don't know what you got for that year?

A. No, sir.

Q. 224. When did you make the first shipment this year? A. This past season?

Q. 225. Yes, sir, 1898?

A. I think we commenced shipping cattle in August.

Q. 226. What was the price of beef cattle in Chicago in August, 1898?

A. I couldn't testify about that without getting the returns which I have up here at my office.

Q. 227. Well, how do you get the value of these beef cattle at thirty-five dollars a head all around in the month of October, 1897, if you cannot remember what the quotations were in Chicago, during the month of October, or prior to it?

A. I get it from the returns. I have a general recollection of what cattle would bring by the hundred pounds.

Q. 228. Did you make any other purchases of cattle in 1897, except this one herd that we have been talking about? A. Yes, sir.

Q. 229. From whom did you purchase?

A. We bought a herd of cattle from David Auchard, that lives at Fulton in this county, and another from Clifford Martin, and the Martin estate at Fort Benton, and some from Jack Harris down at Fort Benton, and some other small bunches that didn't amount to much. Yes, we also bought some from Mrs. Nichols.

Q. 230. When did you buy the Nichols cattle?

A. Oh, I couldn't say exactly; along in the spring.

Q. 231. Prior to the time you made this purchase?

A. Yes; I think we bought them before we bought these.

Q. 232. What did you pay a head for those cattle?

A. David Auchard cattle, $25.00; for the Nichols cattle, $24.00 a head, and Martin's cattle, $22.50.

Q. 233. When was the Martin purchase made?

A. Along in the spring some time.

Q. 234. Were all of these purchases made before you bought these cattle of The Home Land and Cattle Company? A. Yes, I think they were.

Q. 235. The Harris cattle, when did you buy them?

A. Along about the same time.

Q. 236. What did you pay him?

A. About the same price.

Q. 237. Did you buy any in the fall of that year, if you remember?

A. The fall of 1897? No, sir; it isn't customary to buy stock cattle in the fall of the year.

Q. 238. How late in 1897 did you buy any cattle? You said you bought several other small bunches—how late in the season?

A. I think The Home Land and Cattle Company cattle were the last cattle, as well as I can recollect.

Q. 239. How many cattle, all told, did you buy in 1897 for McNamara and Marlow?

A. I will have to figure up.

Q. 240. Can you give it accurately?

A. My memory isn't good on these things. We bought about 1,100 head from David Auchard; 1,100 head from Mrs. Nichols, and about 400 head from the Martin estate, and also 150 head Clifford Martin, and from the Harris estate about 175 head. And there was some other little bunches that I don't remember about; about three thousand head outside of The Home Land and Cattle Company purchase.

Q. 241. Did you buy any cattle in 1898?

A. Did we buy any cattle in 1898?

Q. 242. Yes, sir.

A. Yes, sir, we bought some in 1898.

Q. 243. How many did you buy in 1898?

A. I think either 1,750 or 1,850 head; I don't remember which.

Q. 244. Of whom did you buy them?

A. Bought them of a man by the name of A. C. Quaintance.

Q. 245. What class of cattle were those?

A. Young cattle, all of them; there were no beef in them.

Q. 246. No beef cattle in them?

A. No about a thousand calves, yearlings and two year heifers and steers.

Q. 247. When did you buy these cattle?

A. They were delivered to us about the latter part of April; we bought them in December, 1897.

Q. 248. Those were bought in December?

A. Contracted for in December; I think it was in December we made the contract for them.

Q. 249. What did you pay for them?

A. $26.50 on the cars at Boulder.

Q. 250. Now, you didn't buy any more in 1897 except these?

A. No, if we did, I have forgotten about them. We made a contract for some cattle this year with Judge Gaddis.

Q. 251. What class of cattle were those?

A. Stock cattle.

Q. 252. Is there any difference in the value of stock cattle, as to the breed of them, whether they are Herefords or Shorthorns or any other fancy stock?

A. Yes, sir.

Q. 253. What did you buy of Judge Gaddis?

A. Native cattle; a good bunch of native cattle

Q. 254. Did you buy any of his white-faced cattle?

A. White-faced cattle? No, if you mean Herefords we did not buy any of his thoroughbred cattle.

Q. 255. How much hay did you buy during the winter of 1897 and 1898?

A. Don't buy hay in the winter time; buy it in the summer time.

Q. 256. How much did you buy in the summer of 1897?

A. I couldn't tell you how many tons; quite a considerable quantity.

Q. 257. How much meadow lands have you in the vicinity of Big Sandy, Mr. Marlow?

A. Three or four thousand acres, I should think.

Q. 258. How much hay did you cut during the summer of 1897?

A. Oh, I guess 2,500 tons, probably.

Q. 259. Did you have any of that hay left over?

A. No, sir; didn't have enough to set a hen on.

Q. 260. That was all consumed during the winter of 1897 and 1898?

A. Yes, had to buy some in the spring.

Redirect Examination.

Q. 1. Mr. Marlow, you have spoken about these Quaintance cattle from Boulder, at $26.50 per head; what would it cost to get these cattle down to your ranch in the neighborhood of Big Sandy?

A. And turn them out?

Q. 2. Yes, sir.

A. Well, I guess it would cost a dollar and a half or two dollars a head.

Q. 3. You say there was a limited number of three year old steers bought from Quaintance—some fifty in number, I think you said?

A. I didn't mention any number.

Q. 4. Would that fact affect the value of the animals or the selling price if they were bought in the herd?

A. Certainly it would.

Q. 5. Would it increase or diminish it?

A. It would increase the value, of course, if it had the requisite number of three year old steers in it.

Q. 6. Can you tell us approximately how much more it would make?

A. Well, if that band of cattle had had its regular quota of beef cattle in it, it couldn't have been bought at the time that we bought them for less than thirty or thirty-one dollars a head at that time.

Q. 7. Can you give us an estimate of the probable cost of transporting and getting the Gaddis cattle over to your place? A. No, sir.

Q. 8. They would be driven, would they?

A. We expect to drive them. It would probably cost a dollar or a dollar and a half a head. Mr. McNamara's testimony would probably be better upon that subject.

Q. 9. I understood you to say you could not give the approximate price, or the exact price of steers—which was it, without reference to your books?

A. Not the exact price; I said I could only give it approximately.

Q. 10. Well, you declined to give Judge Cullen, even approximately, an answer upon that matter? How long would it take you to get your books here?

A. Only a few minutes.

Q. 11. Coming down to this October 21st and 22d, at Oswego, did this controversy which you had on the 21st, or rather on the 22d—with Mr. A. W. Niedringhaus and Mr. Sharp, excite any illfeeling on the part of those gentlemen.

By Mr. CULLEN.—I object to that as immaterial.

(Sustained.)

By the MASTER.—Ruling reserved.

A. Why Mr. A. W. Niedringhaus kept his temper and acted very nicely. My recollection of it is that Mr. Sharp lost his temper several times; in fact acted quite ugly.

Q. 12. Now, the herd of cattle that were driven down to the Fort Peck Agency were delivered on October 22d, weren't they? A. Yes, the 22d.

Q. 13. And the other bunch had been delivered on October 21st? A. Yes, sir.

Q. 14. Had you been together the evening of the 21st of October, yourself and Mr. McNamara, and Mr. Sharp and Mr. A. W. Niedringhaus? A. No, sir.

Q. 15. Did you spend the evening together?

A. No, sir.

Q. 16. Or part of the evening?

A. Not that I recollect of.

Q. 17. I will ask you if you didn't take supper together.

A. Come to think about it, I believe that Mr. A. W. Niedringhaus did come up and take supper with us; I wouldn't be positive about Sharp.

Q. 18. I will ask you whether in the course of the dealings with The Home Land and Cattle Company for the sale and delivery of the cattle in question, any drafts were ever asked for or given prior to the completion of the delivery—of an entire delivery.

A. No, sir, never.

Q. 19. Now, what was understood by the words "complete delivery" or "entire delivery"?

By Mr. CULLEN.—To which we object, for the reason that the parties have defined by their contract what the completion of a delivery was.

(Sustained.)

By the MASTER.—Ruling reserved.

A. What was that?

Q. 20. What do you mean by the words "entire delivery"?

A. I mean all the cattle we got there on one trip; that they delivered in one, two, or three days.

Q. 21. As I understand you, if it took one, two or more days to receive the animals then held at the shipping point, that is what you termed a delivery?

A. Yes, sir.

Q. 22. And it was not until after the completion of such delivery as that, that the drafts had ever been asked for? A. No, sir.

Q. 23. Mr. Marlow, I overlooked this morning to ask you what would have been the probable damage to you by reason of the fact, as you testified this morning, that your Indian contracts could not be carried out without the animals in question that you had contracted for with The Home Land and Cattle Company?

By Mr. CULLEN.—We object to the question for the reason that there is nothing in the issues in this case to which the testimony would be relevant, and it is not

an action to recover any damage, nor is the witness' opinion upon this question admissible.

(Overruled.)

By Mr. WALLACE.—The question in issue is: Did these cattle have a special or peculiar value to the complainants in this action? And one of the reasons assigned is that they were acquired in contemplation of their use in connection with these Indian contracts, and their place could not well be supplied.

By the MASTER.—Ruling reserved.

A. I don't think it would be possible to estimate the damage that would have occurred to us.

Q. 24. Now, you say you made preparations to winter stock in the winter of 1897 and 1898; can you give us an estimate of the damages which would have accrued to you had you not received the animals that you had contemplated to winter with such hay, and on such lands?

A. No, sir, I don't think it is possible to estimate in dollars and cents. We had large quantities of hay put up around there from a ranch that we have there. We have a number of men employed that we have to keep the year round for that class of work which has to be done around a ranch, and we have to get all the stuff we possibly can to work stock with, and it is impossible to tell what damage we suffered.

Q. 25. It couldn't be figured out?

A. It would be pretty hard to figure it out.

Q. 26. Well, could it be done at all?

A. No, sir, I don't think it could be figured out.

Q. 27. You have been asked considerably about the conversation Mr. McNamara had with Mr. W. F. Niedringhaus about October first, 1897, at Oswego; I will ask you whether you overheard anything in that conversation relating to the shortage of nine thousand head of beef steers.

A. Yes, sir, I heard Mr. W. F. Niedringhaus and Mr. McNamara discussing the matter there about October first or second.

Q. 28. Do you remember what Mr. Niedringhaus said, and if so please state it?

A. He asked Mac. about how many cattle he thought they were going to be short—

Q. 29. What kind of cattle?

A. Beef cattle. On that nine thousand head, and Mac. told him he was going to be short about two thousand head. He said he didn't think it possible that they were going to be short that number of head.

Q. 30. Now, did he mention any number himself that he thought they would be short?

A. No, I don't remember any particular number he mentioned that they would be short. He and Mac. walked off talking about the matter, I recollect, and part of the conversation I didn't hear. They went away talking about the matter; but I heard Mr. Niedringhaus make that offer; but Mac. turned right from his elbow—not much further than from here to that window—and said that Mr. Niedringhaus—

By Mr. CULLEN.—We object to what Mr. McNamara said.

Q. 31. Did Niedringhaus hear what Mac. was saying—or anything of that kind occur?

A. No, it wasn't what Mr. Niedringhaus said to Mr. McNamara that I heard; I didn't hear that, except that Mac. turned right from him, and told me what he had said to him.

Q. 32. But these other portions of the conversations that you have testified to you heard yourself?

A. Yes, sir.

Q. 33. As far as you know, had this steer shortage question been discussed prior to that time?

A. That is the first time it was ever discussed in my presence. Everybody recognized that there was going to be a shortage in the steers. I will say this, with reference to that conversation: There is a part of that conversation that I did hear. Mr. Niedringhaus came back from the ranch the next morning after he went home to think the proposition over which Mac. told me he went home for, and when he came back the next morning from the ranch, he said to Mac., in my presence, which I heard—he says: "We cannot accept your proposition; I have thought it over, and we cannot accept it; but we will give you twenty thousand dollars to drop this contract right where you are, and this is the best we will do," and Mac. said, "We will not accept the proposition."

Q. 34. And this conversation was on the 2d?

A. Yes, on the second; I think the first talk was on the first—yes, I guess the second. The first talk was on the first, and Mr. Niedringhaus went home on the south side of the river to chew the thing over in his

mind over night, and that was his reply to it when he came back the next morning.

Q. 35. Do you remember any other remarks made by Mr. Niedringhaus? A. No, sir.

Q. 36. Now, Mr. Marlow, can you tell us the price and the fluctuations in the prices of beef and stock cattle between May 27th, 1897, and October 22d, 1897, in the Chicago market, and have you any papers or memoranda made by you, or under your direction which, by referring to, you could refresh your memory and give the prices?

A. You ask me what the fluctuations in Chicago are?

A. I have here a copy of our account sales for all the cattles we sold during the year 1897.

Q. 37. Now, by referring to your account of sales, can you answer the main part of the question?

By Mr. CULLEN.—We object to his referring to the account sales, unless it appears that the same was made by himself, or under his direction, and that he knows of his own knowledge that the same is correct.

(Overruled.)

A. I absolutely do know, for I wrote it all myself, and took it from the sales. There is no market in Chicago for stock cattle. I would answer the question as to beef cattle in Chicago, between May 27th, 1897, and October 22d, 1897.

Q. 38. Yes, give us the fluctuations?

A. We didn't ship any cattle out of this country in May to the Chicago market. There is no market there for our class of cattle at that time of the year. From the time we began shipping these cattle to the close of

the season in October, the market stood about the same; that was along in the neighborhood of from four cents up to $4.50 per hundred pounds for steers.

Q. 39. How long did you say that price remained steady?

A. During the shipping season from the time we commenced shipping in cattle till October.

Q. 40. Did the prices remain the same?

A. No, but that was about an average price.

Q. 41. Now, the price that you got, $4.50 a hundred, what would be the value of the steers, beef cattle, in the season of 1897.

A. The easiest way to answer that question is to get the average of what these cattle brought in Chicago.

Q. 42. Give that?

A. The average net value of all the steers that were shipped out of that N. herd for that year was $35.50 in Chicago, 6,055 head.

Q. 43. Well, what was the average value of the spayed cattle?

A. The spays and cows were sold together.

Q. 44. And what would you say as to the value in 1897—after October 22d? A. In Chicago?

Q. 45. Yes, sir; in Chicago.

A. I don't know as I can give that, because we don't ship any cattle there after that time of the year.

Q. 46. Did you ship any cattle there in 1898?

A. Yes, sir.

Q. 47. In 1898—in the shipping season of 1898, what

was the average beef cattle worth or selling for in Chicago?

A. Well, this particular kind of cattle would probably have brought, during the season of 1898, I should think, judging by our sales this year, from three to four dollars per head more.

Q. 48. More than the figures in 1897?

A. Yes, sir.

Q. 49. That would be how much?

A. Run up to $39.00 or $39.50. I would say, however, in giving this testimony that that is largely on the sales of the Texas cattle. I can turn to the cattle shipped from Big Sandy, and show that they netted us more.

Q. 50. The prices then that you have given in your previous question are based on this herd of cattle?

A. Well, this herd of cattle which were largely Texas cattle. About $4.35 was the top market price on any of these cattle, and that was for only a few of them. A majority of these cattle brought from $3.90 up to along about $4.10.

Q. 51. And at those selling prices, what would be the selling price of the average animal?

A. Along about that price.

Q. 52. Well, I mean for the animal?

A. Well, that brings the average up to about $35.50.

Q. 53. Well, what was done with the spays?

A. Sold along with the cows and heifers.

Q. 54. You are sure of that; you can confirm that by looking up the record, can you? A. Yes, sir.

Q. 55. You said in your cross-examination that the

selling price of beef in Chicago affected the value of stock cattle in this country; can you, now that you have the figures before you, can you tell us what would be the average value in Montana of the stock cattle of the kind that we are discussing for the years 1897 and 1898, the market value?

A. Well, I consider from the price that these cattle were bringing, from the time that we bought them on, there was an enhancement in the value of them. We wouldn't have been able to have bought them at the termination of the season at the prices we bought them for on the 27th of May.

Q. 56. Would you have been able to buy similar cattle, a similar class of animals anywhere?

A. No, sir; we couldn't have bought them at any price that time of the year.

Q. 57. Then as I understand you the price of stock cattle advanced? A. Yes, sir.

Q. 58. Did that apply to the year 1898?

A. Yes, sir.

Q. 59. I will ask you then how the price of this class of animals compared with the prices for similar animals in 1896?

A. Well, they were very much better in 1897.

Q. 60. They were still enhancing?

A. They were still enhancing, yes, sir.

Recross-Examination.

Q. 1. How do you know what they brought in 1896 in the Chicago market?

A. Had a copy of the account of sales of all the cattle that we sold in 1896.

Q. 2. Have you got that yet? A. Yes, sir.

Q. 3. Will you bring it in, so that we can see whether you are right or not, Mr. Marlow? A. Yes, sir.

Q. 4. Now, how do you know what Texas steers brought in the Chicago market in 1898, similar to the steers from this herd?

A. I know what all these cattle sold brought this year, out of the same herd of cattle.

Q. 5. What did they bring?

A. Brought more money than they did the year before.

Q. 6. How much more? A. I wouldn't say.

Q. 7. Have you got those figures?

A. Yes, sir; I have got all those figures up at the office too.

Q. 8. What did it cost you to get your cattle from Oswego up to Big Sandy?

A. From Oswego to Big Sandy?

Q. 9. Yes, you shipped quite a lot of these cattle to Big Sandy, did you not?

A. Yes, sir; shipped a lot of them back.

Q. 10. Well, what did it cost you, Mr. Marlow?

A. I guess it cost us from a dollar to a dollar and a half.

Q. 11. You are sure it didn't cost you two dollars a head to get them up there?

A. Oh, it might have; I wouldn't be positive; that is a matter of record; we can tell exactly what it did cost.

Q. 12. Well, Mr. Marlow, can you be more definite?

A. Well, I will make my answer twenty dollars a car.

Q. 13. Let me see; when were these Quaintance cattle bought?

A. Well, I can't tell you exactly; it was in December, I guess.

Q. 14. When were they delivered?

A. They were delivered in April; I remember that distinctly.

Q. 15. What did they cost per head to deliver?

A. Well, I don't remember about that; I think the rate on them was $25.00 a car, if I remember right.

Q. 16. How many cattle did you buy of Quaintance?

A. I think we got between 1,750 and 1,800 head of cattle from Quaintance, as far as I can recollect.

Q. 17. Now, you have said something about that band of cattle not having its proper proportion of beef cattle. What would be the proper proportion for a herd of that size to have—three and four year old steers?

A. Ought to have 300, anyway; three hundred head of three year old steers.

Q. 18. What did you reckon as beef cattle?

A. Certainly nothing less than full three year olds. We don't pretend to ship all of our three year olds; but only the best of them.

Q. 19. No dry cows or spayed heifers reckoned as beef?

A. Yes, they are beef; but there was nothing of that kind in that herd; it wasn't a regular herd of cattle; it was cattle that we picked up around the country and fed through the winter.

Q. 20. Now, you say that prior to this time no drafts had been made until all of the cattle—prior to October 21st, no drafts were made until all the cattle that were brought in were delivered. Take, for example, the shipments that were made in August; how many drafts were made during that month?

A. I wasn't present at any other deliveries.

Q. 21. You don't know?

A. Yes, I do know something about it, too.

Q. 22. Well, let us have what you know about it.

A. Cattle that were delivered August 18, 19, 20 and 21st, I furnished a list to the stenographers here. We paid them in one draft when we got that batch of cattle—one draft on Rosenbaum Brothers.

Q. 23. The cattle that were delivered September 30th, and October 1st and 2d, when were they paid for?

A. Paid for in another draft the same way; the whole batch together.

Q. 24. There had been some controversy, hadn't there, about your delay in sending drafts—between you and the National Bank of Commerce?

A. Not to my knowledge. I don't know of one word of controversy upon that subject at all. Our relations up to that time were as pleasant as pleasant could be.

Q. 25. Had there been any delay in sending drafts?

A. No, sir; there never was; we paid at once for the cattle, as soon as we got them.

Q. 26. Now, as I understand you, you bought these cattle from The Home Land and Cattle Company, having in mind the contracts which you had expected to get for the delivery of beef to the Indian Agency, to a certain extent? A. Yes, sir.

Q. 27. How many of these cattle were used for filling your contracts? A. I couldn't tell you exactly.

Q. 28. Well, approximately?

A. Well, anywhere from 500 to 1,000 head for beef.

Q. 29. That is all that was used for filling contracts?

A. A thousand head probably. That is a hard thing to say.

Q. 30. You filled all of the contracts which you had in 1897 with the Government?

A. Yes, sir; we filled all the contracts for beef.

Q. 31. There was no damage claimed against you by reason of any shortage, or by reason of the quality of the beef? A. Where?

Q. 32. On the part of the Government?

A. No, sir; we have always filled our contracts.

Q. 33. Then, as a matter of fact, Mr. Marlow, you were not actually damaged, so far as your beef contracts were concerned, by the failure to deliver the 1895 head of beef?

A. Well, we filled all of our contracts. I cannot say that we were damaged by failing to get that particular lot of cattle.

Q. 34. Now, with reference to the provision you had made for feeding stock up there; I understood you to say that all your fodder, hay, etc., that had been provided had been consumed during the winter of 1897 and 1898?

A. Yes, sir.

Q. 35. You weren't damaged, then, by reason of the shortage in this respect?

A. We made no claim; we expected to feed the calves and young stock.

Q. 36. How many stock cattle out of this lot did you have at Big Sandy? A. Out of what lot?

Q. 37. The lot you purchased of The Home Land and Cattle Company; how many all together were taken up to Big Sandy? A. The whole thing?

Q. 38. Yes, sir; approximately, can you tell?

A. Yes, sir; can figure that out all right.

Q. 39. Yes, you have already given the figures of what you shipped, and the total number of what you received?

A. 8,965 head.

Q. 40. On the first day of November, 1897, about how many head of stock cattle did McNamara and Marlow own?

A. How many stock cattle we owned on the first day of November, 1897?

Q. 41. Yes, sir? A. I don't know.

Q. 42. About how many did you own at that time?

A. I don't know.

Q. 43. Aside from those you got of The Home Land and Cattle Company, did you own ten thousand head?

A. I don't know.

Q. 44. Have you any means of finding it out.

A. I don't believe there is any good means of finding it out.

Q. 45. Are you able to say about what proportion the number you got of The Home Land and Cattle Company, bore to the number of cattle you had?

A. No, sir; I know exactly what we got of them; but I don't know what proportion they bore to the others.

Q. 46. How many did you buy that year, aside from what you got of The Home Land and Cattle Company?

A. I answered that once; about three thousand head.

Q. 47. You had those that winter?

A. No, we sold some of them.

Q. 48. Well, how many stock cattle did you have that were wintered there at Big Sandy that winter?

A. Well, I don't know; I couldn't even figure that out, because we kept no track of the beef we shipped out of that. We didn't keep the beef sales separate out of that. We did keep the beef sales separate from this herd, because it was a big herd. The others, they were with the other cattle, and no track was kept of them at all.

Q. 49. Well, what class of cattle did you have during the winter of 1897—that you fed?

A. Calves that were weaned from their mothers, and that were big enough to take away in the fall; and cows with calves that were too small to take away from their mothers; then cows, yearlings, bulls and that kind of stock.

Q. 50. Do you remember how many you fed that winter—the winter of 1897 and 1898?

A. We probably fed from three thousand to thirty-five hundred head. I don't know exactly.

Q. 51. What proportion of the number you fed came from the N. Bar N. herd? A. I don't know.

Q. 52. Can you tell about what?

A. No, sir; couldn't begin to tell.

Q. 53. Now, Mr. Marlow, don't you know, as a fact, that less than a third of the cattle that you fed that winter, came out of the N. Bar N. herd?

A. Do I know that less than a third—

Q. 54. Must have come out of that N. herd?

A. No, sir; I don't know it to be a fact; I don't believe it to be a fact; I think, though, very much more than a third of the stuff we fed did come out of that N. herd.

Q. 55. And how much larger than a third can you say?

A. I wouldn't say, because I don't know. Mr. McNamara can tell you more about these things.

Q. 56. So you don't know that you suffered any actual damage from your failure to fulfill these contracts, or not so far as the hay was concerned.

A. It seems to me you are working it cross-ways, Judge. We had no shortages. We got feed for all of the stuff that we expected to get out of them.

Q. 57. So there was no actual damage, was there?

A. Judge, the people were not short on any of the beef steers in that herd.

Q. 58. You were not actually damaged so far as hay was concerned, by reason of that fact?

A. Well, we would have been damaged if we hadn't got this 457 head of stock cattle. We took care of that.

Q. 59. How many calves were there in that 457 head of stock cattle, Mr. Marlow? A. 156 head.

Q. 60. Were those all fed that winter?

A. Yes, sir; I think every hoof of them was fed.

Q. 61. Then of the three thousand that you fed, 157 head came out of that 457 head? A. Yes, sir.

Q. 62. How many weak cows were there that you fed during that winter? A. I don't know.

Q. 63. Did you feed the entire 457 head?

A. No, I don't think we did the entire 457 head. I think there were probably some that were decent enough to let go.

Q. 64. Well, you were there a good share of that winter, weren't you, Mr. Marlow?

A. No, I always tried to get away from there.

Q. 65. Now, Mr. Marlow, I wish you would refresh your recollection, and tell us when this conversation that you testified about took place, as nearly as you can —the conversation that was interrupted, when Mr. Niedringhaus went to the ranch and returned the next morning?

A. I think, as well as I can recollect, it was about the first of October. We had cattle there which they had delivered; we had cattle on the 30th day of September and the first and second day of October, and I think the talk was before they finished that delivery; if that

was the case, that would be about the first day of October, the second day of that delivery down there. That is my recollection about it.

Q. 66. That is a part of the same conversation that you testified to. There was but one conversation that you undertook to tell about was there.

A. The conversation on the shortage.

Q. 67. Yes, sir.

A. No, sir; only that one conversation.

Q. 68. Now, refresh your memory; is it not clear to you that the conversation took place after the cattle had been delivered?

A. No, sir; it isn't absolutely clear that it took place after they were all delivered; I couldn't say whether they were entirely through or not. I know that Mr. Niedringhaus went home over night to think this matter over, and came back, and the end of the conversation was on the following day. It has been Mr. McNamara's and my custom, since I have been there, to get out of that place at five or six o'clock when the train was going west; and if we had been through with the delivery of the cattle, we would have been going home. That is my reason for thinking it. It was on the first day of October, and there was still some cattle to be delivered.

Q. 69. If you said it took place on the first day of October, after the delivery of the cattle, it was liable to be a mistake?

A. Yes, sir; I believe it was the first day of October, before we got entirely through with the delivery of the cattle.

Q. 70. What was the price of cattle in Chicago in 1898, during the season of 1898, how did it range per pound? Beef is always sold there by the pound, hasn't it?

A. Yes, 100 pounds. We were selling a different class of cattle that year. Take our native cattle; they ran this year from four to four and a half cents per pound; we got as low as $3.85 on some cattle. I should think this year our cattle averaged from $4.15 to $4.25.

Q. 71. Now, you have said what the N. cattle brought last year in the Chicago market, but what was that per hundred pounds, how did that range? By last year you mean the year 1898?

A. I don't know; I must look up the record on that. There was too many of them to remember.

Q. 72. Do you not recall the fact that it brought less than the beef which you sold from your own herd?

A. That we sold from our own herd the same year?

Q. 73. Yes, sir. A. Certainly.

Q. 74. About how much?

A. Well, I wouldn't say how much. When I say I don't know how much they brought this year, how can I tell you? I know that Texas cattle ran ten dollars less per head; they didn't weigh as much, and they didn't bring as much, either. That is the way they ran in 1897, about the same way.

Q. 75. Do you recall whereabouts this conversation with Mr. Niedringhaus took place the following morning, when he came back and said he wouldn't accept the offer that had been made? A. Yes, sir.

Q. 76. Where was it?

A. Right close to the corner of the stock yards.

Q. 77. Who was present?

A. I don't think there was anybody present except Mr. McNamara and myself.

Q. 78. This was Mr. H. L. Niedringhaus?

A. No, sir; Mr. W. F. Niedringhaus.

Redirect Examination.

Q. 1. In answer to a question of Mr. Cullen, he asked you, did he not, whether you had suffered any damage by reason of your Indian contracts, from the shortage of the steers that were delivered in 1897, and you said no you didn't think you had?

A. Yes, sir; I understood it. If we had suffered any loss by the failure of that company to deliver the 1895 head of steers.

Q. 2. Now, I will ask you whether you would have suffered any loss in your Indian contracts, if you hadn't received 457 head which are the subject matter of this suit? A. Yes, sir; we would.

Q. 3. And that is what you said in your direct examination—the loss, that you couldn't estimate in dollars and cents?

A. Yes, sir; but we would have suffered a loss on that batch of cattle on Indian contracts if we hadn't had them.

Q. 4. That would be the same condition of affairs as to wintering the animals? A. Yes, sir.

Q. 5. Then, if you had not received this 457 head, you would have suffered a loss in preparing for this stock?

A. Yes, sir.

Q. 6. And that is the loss that you cannot estimate in dollars and cents? A. Yes, sir.

Q. 7. And further in answer to a question by Mr. Cullen, you stated that you had delivered about a thousand head of beef cattle on Indian contracts; is that the only kind of animals you delivered on Indian contracts?

A. No, sir; there was various other kinds of animals.

Q. 8. What kind of animals?

A. We sold bulls out of that 457 head that were not delivered; we sold one, two and three year old heifers that we agreed to sell out of that 457 head of cattle.

Q. 9. Now, aside from this 457 head, can you tell us approximately, beside steers that were turned over to you for filling Indian contracts?

A. No, sir; that would be hard to say. We filled a contract for one and two year old heifers in the spring out of those we had wintered and took care of, this 457 head of cattle, and others of our own as well; so it would be hard to define how many were N's and how many were our own.

Thursday, January 26th, 1899.

Morning Session.

Mr. Marlow recalled, and his examination continued. (By Mr. McINTIRE.)

Q. 10. How would the firm of McNamara and Marlow have been damaged, so far as their Indian contracts

were concerned if they hadn't received from the receiver appointed by the Court the 457 head of cattle?

A. We would have been damaged, as I said before, through lack of having stuff to feed, that we had made preparations to take care of them. Another way we would have been damaged would have been from a lack of stuff that we disposed of on Indian contracts, that we wouldn't have had to dispose of.

Q. 11. Did you not have in your herds more than 457 head of cattle, aside from what would be required to fill all of your Indian contracts?

A. We probably did; that is a hard question to answer. 457 head brings us down to a pretty fine point. We had a good many head of cattle, and used them for filling Indian contracts more than 457 head.

Q. 12. How much hay did you buy in the spring of 1898?

A. I don't recollect, exactly; a small quantity the last end of the season.

Q. 13. About how much do you mean by a small quantity?

A. We may have bought perhaps a hundred tons; somewhere in that neighborhood; I am not positive about it. I don't believe to exceed that.

Q. 14. Now, when you say that if you hadn't got that 457 head you couldn't compute the damage which you might have sustained on account of your Indian contracts, do you mean that the damage was so great or so small that you couldn't compute it?

A. Well, I don't mean either one. I meant what I said, that it was a damage that would be hard to compute, that I wouldn't care to undertake to compute it.

Q. 15. Is the same true as to the matter of hay that you spoke of? A. Yes, sir; it is true.

Recross-Examination.

Q. 1. What was the character of the spring of 1898 for severity or mildness?

A. It was an unusually hard spring.

Q. 2. And it ran down to what portion of the year?

A. The month of March was very bad, and we were feeding cattle up to perhaps the middle of April. It was very late.

Q. 3. And of the cattle that were being fed, were any of them of this 457 head that had been turned over to the receiver? A. Yes, sir.

Q. 4. And it was by reason of the fact of the severity of the season, and the necessity of feeding all these animals that the stock of hay which you had put up, or bought in 1897, and the quantity of hay you bought in the spring of 1898 was consumed, is that right?

A. Yes, sir.

Redirect Examination.

Q. 1. Mr. Marlow, yesterday you were requested by Mr. Cullen to produce such papers as you had, showing the average prices per cwt. of such animals as were shipped out of the herd of The Home Land and Cattle Company in 1898; have you now got those papers?

A. Yes, sir.

Q. 2. Referring to those papers, what have you to say as to such average price?

A. I haven't figured the average price per hundred pounds on these cattle; the customary way of figuring cattle is per head. It is a net value of $28.75 per head, including nearly a hundred head of calves in about 500 head. If the calves were not included, the average price of the animals would be more.

Q. 3. The branded calves would be the calves of 1897?

A. No, sir; the branded calves of 1898.

Q. 4. And in arriving at this average per head, I presume you have the number of animals that were shipped by the company? A. Yes, sir.

Q. 5. What was that number?

By Mr. CULLEN.—We object to that for the reason that it is hearsay, and not the best evidence.

(Overruled.)

A. 497 head.

Q. 6. Shipped by The Home Land and Cattle Company in 1898?

A. Yes sir; and other people for them.

Q. 7. Other people for them? You mean by that they were strays, do you? A. Yes, sir.

Q. 8. So that the total number was how many?

A. 497 head.

Recross-Examination.

Q. 1. This information with reference to the number of head shipped by The Home Land and Cattle Company was taken from the office of the stock commissioners, was it not?

A. It was gotten from the office of the stock commissioners in Helena, and also from the office of the inspector of stock in Chicago—Mr. Landers. Also accompanied by account of sales of Rosenbaum Brothers & Co.

Mr. MARLOW, recalled, testified as follows:

1st Q. You were present and heard the inquiries of Judge Cullen on the last hearing, of McNamara about the drafts and the number of deliveries etc.?

A. I was.

2d Q. Have you since gotten your books and accounts bearing upon this? A. Yes, sir.

3d Q. Produce them will you?

A. Yes, sir. (Produces books.)

4th Q. Have you prepared any abstracts from the books?

A. Yes, sir; I have prepared abstracts covering the whole transaction.

5th Q. Have you these abstracts with you?

A. Yes, sir.

6th Q. You are a bookkeeper yourself, are you not?

A. Yes, sir.

7th Q. Of how many years' experience?

A. In 1882 I began keeping books for Mr. McNamara.

8th Q. Did you ever do any experting?

A. I don't claim to be an expert.

9th Q. But you have experted books, have you not?

A. Yes, sir; several times.

10th Q. Do you understand those books?

A. Yes, sir.

11th Q. Have you abstracts showing the results of this transaction? A. Yes, sir.

12th Q. You may produce your abstract.

(Abstract introduced in evidence, marked Exhibit "C.")

Mr. WALLACE.—I wish to file it and offer it in connection with Mr. Marlow's testimony as a bookkeeper.

13th Q. How many drafts do you find were issued by the plaintiff in payment for these cattle delivered in 1897 from the N-N herd?

A. Eleven actual drafts were issued by us; two charges or payments in addition to that were made by the Rosenbaum Brothers on our account without any drafts.

14th Q. How much was the first payment?

A. Fifty thousand dollars.

15th Q. How was that payment made?

A. It was deducted from the first delivery of cattle made to us, amounting to $43,150, the first delivery, from which one-half of the first payment was deducted, $25,000, and our draft number 18,150 sent to the bank.

16th Q. Covering the balance of the first delivery?

A. Yes, sir.

17th Q. How many head were there?

A. 1,726.

18th Q. How many days did it take to make that delivery? A. Two days.

19th Q. Now going back to the first fifty thousand dollars paid, how was the balance of it distributed?

(Defendant objects; immaterial; there is no controversy about the fifty thousand dollars. Overruled.)

By ATTORNEY FOR PLAINTIFF.—There is a controversy as to the number delivered and whether drafts were given at the end of each delivery; as the amount of this first draft will not correspond with the total due for the 1,726 head at twenty-five dollars per head, we ask him to explain; this twenty-five thousand dollars was deducted and draft made for the balance; we propose to explain it by the apparent deficit in the third delivery on account of some subsequent delivery.

A. The second half of that payment was deducted from the delivery of August 16th amounting to $84,975; there was deducted from that, first, the second half of this $50,000; the payment of fifty thousand to the firm of Rosenbaum Brothers, on account of notes which this company owed them, and that was settled between themselves and our draft was made for $9,975.

20th Q. In other words, out of the 4th payment you reimbursed yourselves and your draft was made for the balance? A. Yes, sir.

21st Q. How many head were in that delivery?

A. 3,399.

22d Q. How many days did it extend over?

A. Four days.

23d Q. You spoke of July 11th as the first delivery; Mr. McNamara mentioned a few head delivered on the 1st?

A. Yes, that is the reason for these two receipts for those deliveries the 1st of July and the 11th of July.

24th Q. Was this small amount on the first paid for on the 11th? A. Yes, sir.

25th Q. You speak of the 11th as the completion of the first delivery? A. Yes, sir.

26th Q. You say fifty thousand were distributed between July 11th and August 16th?

A. Yes, sir.

27th Q. How many head were delivered on the second delivery? A. 1,409.

28th Q. How many days did that extend over?

A. One day according to this record.

29th Q. How many drafts were those deliveries paid for in? A. One draft.

30th Q. What did it amount to?

A. Those cattle amounted to $35,225. We sent our draft No. 2 for that amount to the National Bank of Commerce.

31st Q. Is the first covered by one or more than one?

A. First one draft and half of first payment.

32d Q. Well, the third delivery?

A. July 29th, 679 head.

33d Q. Extending over what period?

A. One day.

34th Q. Paid for in how many drafts?

A. Same number.

35th Q. You have given us the fourth; now, tell us the fifth? A. 3,806 head.

36th Q. Extending over how many days?

A. Five days according to this record.

37th Q. Payment for this five days' delivery for that number of head was made in how many drafts?

A. One draft for $89,859.70, and the balance of the

indebtedness due by this company to Rosenbaum Brothers, which was deducted by Rosenbaum Brothers and charged to us, $5,290.30; that is, in making this payment for all of these cattle covered by that delivery of five days, we first paid a balance of the debt due from the company to Rosenbaum Brothers in the amount named and sent a draft for the remainder.

38th Q. That is the one of August 26th.

A. Yes, sir.

39th Q. Now, the next delivery was for how many head? A. 2,351.

40th Q. What day was that?

A. September 2d, 3d, and 4th.

41st Q. That covered how many days?

A. Three days. That delivery was 2,351, and amounted to $58,775.00.

42d Q. Covered by how many drafts?

A. Three drafts.

43d Q. What were the amounts?

A. The 2d and 3d of September, $12,675, and the 4th draft, No. 11, $33,425, the balance of that delivery.

44th Q. There were two drafts of equal amount?

A. Yes, there were the same number of cattle each day.

45th Q. And the third day?

A. The third day there was a larger number.

46th Q. How many were there? A. 1,337 head.

47th Q. That would be at least two trainloads, I presume? A. Yes, it would be.

48th Q. Did you pay for that in a single draft?

A. Yes, sir.

49th Q. Now, your next delivery was when?

A. 1,649 head on September 30th, October 1st, and 2d, three days.

50th Q. The payment was made when?

A. That bunch amounted to $41,225. On October 1st draft for $13,025, on the 2d our draft, No. 13, for $13,825, and again on the 2d draft, No. 15, for $14,375.

51st Q. This takes you down to the time of the next delivery when the trouble began?

A. Yes, sir; cattle credited and the account charged with shortage?

52d Q. Do you recollect anything about whether there was any discussion between yourselves and the representatives of The Home Land and Cattle Company, or between The Home Land and Cattle Company and Rosenbaum Brothers, as to what was to be done with this fifty thousand dollars?

(Defendant objects as immaterial, the fifty thousand dollars being admitted in the pleadings. Sustained.)

A. Yes, there was a discussion bearing on that.

53d Q. What was said concerning it?

A. I cannot recall the exact words.

54th Q. Well, the substance of it?

A. The Rosenbaum Brothers were asking for either a part or all of this payment and the company wished the payment themselves, and it was settled that they were to take part.

55th Q. The Rosenbaum Brothers were asking it for what purpose? A. Their indebtedness.

56th Q. They wanted pay from this company of their indebtedness? A. Yes, sir.

57th Q. Out of this first payment?

A. Yes, either part or all of it.

(Defendant moves to strike the testimony of the witness out with reference to the payment of the fifty thousaid dollars, for the reason that same was immaterial. Sustained.)

58th Q. Was there anything said by the representatives of The Home Land and Cattle Company there present at that time between yourselves as to any chattel mortgages against the cattle?

(Defendant objects, immaterial. Sustained.)

A. Yes, sir; there was some conversation, of which I do not recall the exact words, but we had a memorandum of some chattel mortgages which were out against the cattle, and there was a discussion as to the order in which they should be paid off, but it was largely between W. F. Niedringhaus and Rosenbaum and I did not pay close attention to it; we were not concerned.

59th Q. But they were mentioned?

A. Yes, sir; they were.

60th Q. The fact that they existed, etc.?

A. Yes, sir.

61st Q. And in this discussion with Niedringhaus was Rosenbaum acting as a broker or creditor?

(Defendant objects; not material to any issue made by the pleadings. Sustained.)

A. I should say to a certain extent he was acting in both capacities.

62d Q. Well, as to the particular matter of the chattel mortgages was he having the discussion as a creditor or as a broker?

A. That I would not undertake to say. The matter was to be settled there between The Home Land and Cattle Company and those people as to where these payments were to go, etc., and we left it all to the Rosenbaums.

63d Q. From what source were these liens released, if at all?

A. We took care of ourselves on that proposition by having a consent to the sale executed in writing by all people holding liens against the cattle.

64th Q. The mortgages?

A. Yes, sir. Our first payment was not turned over until the releases were furnished.

65th Q. Was there anything said about the proceeds?

A. Yes, there was.

66th Q. What was it?

A. That was a part I paid little attention to; it was between the Rosenbaums and Niedringhaus.

67th Q. Do you know by the talk whether the mortgages were paid off independent resources or from the proceeds of the cattle?

A. As far as Rosenbaum was concerned, they were paid off in order of precedence and from proceeds of the cattle.

68th Q. Was Mr. Rosenbaum a mortgagee?

A. Yes, sir; he was, if I recollect rightly.

(Defendant moves to strike out all testimony relative to the mortgages, for the reason that the same is not within the issues of this case. Sustained.)

Cross-Examination.

69th Q. Whose writing is that in the book to which you have referred?

A. From the top of the book down to the date of September 30th was our bookkeeper's; after that my own.

70th Q. What do you denominate that book?

A. This book here?

71st Q. Yes, sir.

A. We have no name for it; it is in the nature of a record book for all the cattle we handle, Indian contracts, etc.

72d Q. All you know about the deliveries and the drafts made for them prior to September 30th is simply what you find entered in this book, is it not?

A. Yes, sir; with the exception of the matter of the payment of the August proposition, I was present when that was turned over, and I know that of my own personal knowledge.

THOMAS A. MARLOW.

Subscribed and sworn to before me this ninth day of February, 1899.

HENRY N. BLAKE,
Master in Chancery.

C. J. McNAMARA, one of the complainants in the above-entitled action, being called as a witness on behalf of the complainants, after being first duly sworn by the master, testified as follows:

Direct Examination.

(By Mr. H. G. McINTIRE, of Counsel for Complainants.)

Q. 1. What is your full name, Mr. McNamara?

A. C. J. McNamara.

Q. 2. Your age? A. Forty-three.

Q. 3. Your occupation?

A. I am in the stock-growing business.

Q. 4. What is your present place of residence?

A. Big Sandy, Montana.

Q. 5. How far is Big Sandy from Glasgow?

A. About two hundred miles.

Q. 6. How long have you lived at Big Sandy?

A. Why, about ten years.

Q. 7. Both of these points are on the line of the Great Northern Railway, are they? A. Yes, sir.

Q. 8. You are one of the complainants in this action?

A. Yes, sir.

Q. 9. And a member of the firm of McNamara and Marlow? A. Yes, sir.

Q. 10. You know the officers and agents of the defendant The Home Land and Cattle Company, the defendant in this suit? A. Yes, sir.

Q. 11. You know the officers and agents of the defendant the National Bank of Commerce of St. Louis?

A. Have met the cashier.

Q. 12. Mr. Van Blarcum? A. Yes, sir.

Q. 13. When did you become acquainted with Mr. Van Blarcum? A. In 1897, August, I think.

Q. 14. In connection with this contract which you made with The Home Land and Cattle Company?

A. Yes, sir.

Q. 15. Never had known him before? A. No, sir.

Q. 16. Nor the bank? A. No, sir.

Q. 17 What officers of The Home Land and Cattle Company are you acquainted with?

A. I am acquainted with the president.

Q. 18. Who is the president.

A. Mr. W. F. Niedringhaus.

Q. 19. When did you become acquainted with him?

A. I met him in May, 1897—in Chicago.

Q. 20. That was your first acquaintance with him?

A. Yes, sir.

Q. 21. What other officers or parties connected with the company do you know?

A. I know Mr. Albert W. Niedringhaus.

Q. 22. That is the young man that had the power of attorney for the delivery of the cattle?

A. Yes, sir.

Q. 23. When did you become acquainted with him?

A. About the last of May, or some time in June, 1897.

Q. 24. Where? A. At Oswego.

Q. 25. What other parties belonging to this company, The Home Land and Cattle Company, did you know?

A. I knew Mr. Blackman.

Q. 26. Loss Blackman? A. Yes, sir.

Q. 27. What was his office or function connected with the company, Mr. McNamara?

A. He was supposed to be the general manager for the company.

Q. 28. And what did his duties appear to be on the ranch, where the stock of the company was?

A. He gave orders to the different men who were gathering the stock at first, and sent them out again gathering.

Q. 29. Who was the active man in charge of the company's business on the ranch? A. Loss Blackman.

Q. 30. Did you ever meet Mr. H. L. Niedringhaus?

A. Yes, sir.

Q. 31. When did you become acquainted with him?

A. I had known him for seven or eight years.

Q. 32. Were you down at Miles City when the first conversation about the purchase of these cattle came up?

A. Yes, sir.

Q. 33. With whom was the first conversation had?

A. Joseph Rosenbaum was the man I was talking to.

Q. 34. You, yourself, didn't have any talk with Mr. W. F. Niedringhaus? A. No, sir.

Q. 35. When did you first participate in any negotiations concerning the purchase of these cattle with Mr. W. F. Niedringhaus? A. In May, 1897.

Q. 36. At or about the time this contract was entered into? A. Yes, sir.

Q. 37. Where?

A. In Mr. Rosenbaum's office at the Union Stockyards in Chicago.

Q. 38. That is the office of Rosenbaum Brothers at Chicago, you say? A. Yes, sir.

Q. 39. Who was there representing The Home Land and Cattle Company?

A. Mr. W. F. Niedringhaus, the president of the company.

Q. 40. Anyone else?

A. Yes, I think his son was with him.

Q. 41. Do you know his name?

A. I think it is George.

Q. 42. The one that witnessed this contract?

A. Yes.

Q. 43. Was the meeting there accidental?

A. No, sir; we met there by appointment.

Q. 44. You didn't meet before? A. No, sir.

Q. 45. The appointment was made by correspondence?

A. Yes, sir.

Q. 46. Who arrived at the office first?

A. The Niedringhauses were there first.

Q. 47. How did you happen to meet them there—were they there when you got there?

A. Yes, they were there when Mr. Marlow and I got there.

Q. 48. About what time was it when they met you there?

A. I should think it was about ten o'clock.

Q. 49. What, if any, effect did the promise of 9,000 head of these steers, or the payment in the alternative of $20 per head for any shortage in this number of steers and spayed heifers, have upon the fixing of the price named in the contract.

By Mr. CULLEN.—To which we object, for the reason that the effect that it had upon the contract is immaterial and irrelevant.

(Sustained.)

A. Well, I told Mr.—

By Mr. CULLEN.—Never mind what you told Mr.—

Q. 50. First answer what effect it had, Mr. McNamara, upon the fixing of the price, if any.

A. Well, a guaranty of 9,000 head of steers in a herd of cattle would make it worth more than if the 9,000 steers were not there.

Q. 51. Was the matter discussed and its effect considered in the fixing of the price?

A. Yes, sir, it was.

Q. 52. State what that discussion was.

By Mr. CULLEN.—To which we object, for the reason that it is immaterial. The result of the negotiation was a written contract, and the contract is the best evidence.

(Sustained.)

By the MASTER.—Ruling reserved.

Q. 53. What effect did this guaranty of the 9,000 head or the promise to pay $20 per head in the absence of that number have in fixing the price?

A. We agreed to take the cattle at the price named. The sum of $25 per head if they would guarantee having 9,000 head of steers three years old and upwards and spayed heifers of that age, or we agreed to take the cattle without this guarantee of any number of steers at $23 per head.

Q. 54. It represented, then, the difference between the $23 and the $25 per head? A. Yes, sir.

Q. 55. Do you remember who drew the contract?

A. Mr. Marlow and Mr. Niedringhaus fixed up the

writing of the contract and agreed on it; I don't remember who did draw it.

Q. 56. No attorney fixed it up?

A. No, sir; my recollection is there was no attorney.

Q. 57. Did you look at the contract to see when it was made?

A. It was made on the same day it was signed.

Q. 58. Do you remember if that was the same day you met in Chicago? A. Yes, sir; the same day.

Q. 59. Everything was closed up in one day?

A. Yes, sir; everything was wound up in one day.

Q. 60. *When* did you and Mr. Marlow go when the contract was completed?

A. Went to the Auditorium Annex Hotel.

Q. 61. And when did you leave the city?

A. I think the following day.

Q. 62. Did you see the Niedringhauses there?

A. Yes, sir; had dinner with them in the evening at the hotel.

Q. 63. Any understanding as to the commencement of deliveries, or didn't you talk about it?

A. No, they didn't know exactly when they would commence; they told us they would notify us of that later.

Q. 64. Did they notify you? A. Yes, sir.

Q. 65. When did they commence?

A. Commenced in June.

Q. 66. Did they commence in accordance with the notification? A. Yes, sir.

Q. 67. Do you state from memory as to the dates of the various deliveries?

A. No, we didn't get any cattle in June; I was mistaken about that; it was July when the deliveries commenced.

Q. 68. What time was it in July when the deliveries first commenced?

A. It was in the fore part of July; I don't remember the date.

Q. 69. How were these deliveries made as to being in trainload lots or substantially in trainload lots?

A. Supposed to be in trainload lots.

Q. 70. How many trainloads would you get in a single delivery?

A. Sometimes one and sometimes as high as six or eight.

Q. 71. What was the custom of turning over all of the cattle that had been gathered at one delivery?

A. For instance, they would commence to-day and turn over the delivery and follow it up the next day until they had turned over all they had at that time.

Q. 72. Was that the custom that was followed all the way through? A. Yes, sir; it was.

Q. 73. How did the deliveries run as to shipping, as a rule—a single trainload lot or several trainloads?

A. Well, there was generally three or four trains of cattle at every delivery, and at one time I remember of receiving seven trains of cattle in one delivery, shipping six to Chicago and one to Big Sandy.

Q. 74. Was there any system by which you selected these cattle from the herd as to shipping them to market or sending them to the ranch at Big Sandy?

A. Yes, sir.

Q. 75. What was that custom?

A. We shipped all the steers that we had fit for beef to Chicago and all the dry cows. In fact, all the cattle that were fit for beef we shipped to Chicago, and all the others we shipped to Big Sandy.

Q. 76. Do you know the total number of stock that you shipped to Chicago out of that herd?

A. No, sir; I don't without looking up the books.

Q. 77. Can you look at the books and tell?

A. Yes, sir.

Cross-Examination.

(By Mr. CULLEN.)

Q. 1. Mr. McNamara did you make that memorandum which you have in your hands there or was it made under your direction?

A. Well, it was made by our bookkeeper.

Q. 2. You were not present when it was made?

A. No, sir; I was not.

By Mr. CULLEN.—I object to that for the reason that it is not shown that the witness either made it himself or was present when it was made or directed it to be

(By Mr. WALLACE.)

Q. 78. Is it a part of the regular bookkeeping or results of your business, Mr. McNamara?

A. Yes, sir; it is.

Q. 79. Is it the custom in your business to keep such a statement as a part of your books and business accounts? A. Yes, sir.

Q. 80. Is that the statement that was so kept?

A. Yes, sir.

Q. 81. Now, will you kindly turn to the point in the statement which shows the number of cattle shipped to Chicago?

By Mr. CULLEN.—We object to the witness using the memorandum which he holds in his hands, for the reason that it does not appear that it was made by himself or under his direction or that he knows it to be correct or that he ever examined it before.

(Overruled.)

By Mr. WALLACE.—It does appear that it is a regular part of the business books of account, and that they kept these statements as a part of their bookkeeping system of accounts and the paper as such is admissible in evidence we contend; it is a book of original entry.

By the MASTER.—Ruling reserved.

Q. 82. Does that show the steers?

A. I guess it does, but I cannot see it; I know from memory pretty near what we shipped.

Q. 83. Now, what was the approximate number which you said was shipped from your memory, steers and dry cows—everything that went as beef to Chicago?

A. Between eight and nine thousand head.

Q. 84. Well, going back to the matter of these deliveries that we were speaking of, under this contract, was there or was there not any uniform rule followed in delivering and receiving these cattle as to the time when the payments would be made and the manner of payment?

By Mr. CULLEN.—We object to that for the reason that the time and manner of payments is provided for in the contract and cannot be varied by custom.

(Overruled.)

By the MASTER.—Ruling reserved.

A. Why, the cattle were always paid for immediately after finishing the end of one delivery, or as soon as I got back to Big Sandy there was a draft sent to cover that delivery—all that was received on one delivery.

Q. 85. Covered all that was received?

A. Yes, sir.

Q. 86. When you say a draft to cover that amount, what do you mean by the amount of the draft?

A. I mean $25.00 a head for every head of cattle received.

Q. 87. The total required to make the total price per head for all the cattle you had received at previous deliveries? A. Yes, sir.

Q. 88. When you speak of the delivery in this sense are you referring to a single train load or all turned over at any one time?

A. All turned over at any one time.

Q. 89. Was there ever a time before October 21st and 22d when there was any request made by the persons delivering the cattle under the contract for the payment of any of the purchase price at the end of a single trainload if there were more than trainload lots there for delivery?

By Mr. CULLEN.—We object to the question because it is incompetent, irrelevant, and immaterial.

(Overruled.)

A. No, there never was any such demand made.

Q. 90. When was the first demand, if any, made in the midst of a delivery?

A. About October 20th, 1897.

Q. 91. At the time of what you called the final delivery? A. At the time of the final delivery.

Q. 92. Had you at any time before October 21st had any talk with any of the Niedringhauses, the representatives of the defendant, concerning the probable amount of this steer shortage under the contract?

A. Yes, sir.

Q. 93. When and where was that first talk and with whom?

A. It was with Mr. W. F. Niedringhaus, the president of the company, and about thirty steps north of the trading store at Oswego.

Q. 94. And when?

A. It was about the 1st of October. About that time; I wouldn't be positive as to the date.

Q. 95. Can you fix it with reference to any delivery of cattle under the contract?

A. It was in the midst of a delivery of cattle next to the last delivery that we got.

Q. 96. This W. F. Niedringhaus that you speak of was the president of the Cattle Company? A. Yes, sir.

Q. 97. Who, for the defendants, had been present supervising the delivery of all the cattle under this contract at deliveries made prior to and inclusive of the time of this talk with W. F. Niedringhaus?

A. W. F. Niedringhaus.

Q. 98. Did he look after the deliveries in person?

A. Yes, Mr. W. F. Niedringhaus looked after the deliveries in person.

Q. 99. What was he doing there at the time of this talk?

A. He was there on that business, to turn over or deliver all cattle that we had been taking at that time.

Q. 100. When, if you know, did the National Bank of Commerce of St. Louis, become connected with the contract, or did you have notice?

A. Yes, sir; we had notice of that shortly after making the contract.

Q. 101. Was that notice received in the form of a letter?

A. Yes, sir; it was received in the form of a letter from Mr. Van Blarcum and Mr. Niedringhaus.

Q. 102. Then Mr. W. F. Niedringhaus was representing the parties concerned in the delivery of the cattle at all the deliveries that were made except the last?

A. I wouldn't say all; he might have been there on some other delivery.

Q. 103. Have in your memory any other delivery when he was not there?

A. I think he was there on every delivery except one delivery.

Q. 104. But you cannot locate it?

A. No, sir; I am not positive.

Q. 105. So far as you know he was the man that represented them on all deliveries?

A. Yes, sir; he was the man that represented them to turn the cattle over.

Q. 106. Now, coming down to this conversation about the shortage at Oswego, who was present at that time?

A. Mr. Marlow was about ten feet away from me; he was the closest man to me.

Q. 107. Now, tell what the talk was between yourself and Mr. Niedringhaus?

A. Mr. Marlow and myself were walking back of the store—probably twenty or thirty steps back of the store—and Mr. W. F. Niedringhaus called to me and I went over to him and he said, isn't there some way we can settle on this shortage and stop where we are. I told him I didn't know whether we could or not, and asked him what he wanted to do about it—asked him how much he thought he would be short. He said he thought he would be short about a thousand head. I told him I thought he would certainly be short two thousand head; to which he replied that he didn't think they would. He said he would give us twenty thousand dollars if we would stop right where we were and settle the thing up. I told him no, that I couldn't take his proposition, but

I told him that we would take thirty thousand dollars, and he keep his horses. To this he replied that he would let me know in the morning. The following morning he came over to Oswego again and told me that he had made up his mind he wouldn't accept my proposition.

Q. 108. Did you have any talk with him at or about that time concerning when they would be through the delivery of the cattle?

A. Yes, sir; that same day.

Q. 109. What was that talk?

A. He told me that he would make the final delivery about the 14th of October.

Q. 110. What else did he say?

A. He asked me if I would take a certain number of drys that were thin in flesh and not fit to ship to Chicago on that delivery.

Q. *110.* Had these steers been offered you before?

A. Yes, sir; according to the terms of the contract we were not compelled to take any steers of three years and up until such time as they were beef. This was a bunch of cattle that was held up five or six miles from Oswego.

Q. 111. Why had they been held there?

A. Because they were not in a fit condition to go to Chicago.

Q. 112. Who had determined that? A. I had.

Q. 113. You had rejected them from time to time before? A. Yes, sir.

Q. 114. And it was these cattle he was asking you about—these steers and spayed heifers?

A. Yes, sir; on this final delivery on the 14th of October.

Q. 115. What did you say to him?

A. Told him I would take everything.

Q. 116. Did you take them? A. Yes, sir.

Q. 117. Was that delivery made as stated by him on the 14th? A. No, sir.

Q. 118. Did you go down there on the 14th expecting to receive them? A. Yes, sir.

Q. 119. Had you received any notification between the interval this took place on the 2d and the 14th that they wouldn't deliver the cattle? A. No, sir.

Q. 120. When did you get the first notification that they wouldn't deliver?

A. When we got to Oswego on that day.

Q. 121. Who was with you? A. Mr. Marlow.

Q. 122. What, if any, talk did you have with Mr. Blackmon concerning the delivery on the 14th?

A. I asked him if he was going to turn over to-day; he replied that he hadn't any instructions from Mr. Niedringhaus as to when he would turn over. I asked him how many cattle he had and he told me about 1,400 head, and said that he was through gathering for the season, but had no instructions to turn these cattle over and couldn't turn them over until Mr. Niedringhaus gave him instructions to do so. He said he expected Mr. H. L. Niedringhaus there that evening.

Q. 123. Did you understand where these cattle were that he said he had? A. Yes, sir.

Q. 124. Where were they?

A. They were about four or five miles north of Oswego.

Q. 125. Being held by him?

A. Being held by one of his men.

Q. 126. Do you know Caldwell?

A. Yes, sir; they were being held by Caldwell.

Q. 127. Do you remember who was present in this talk with Mr. Blackmon?

A. I don't remember anybody in particular; there was several people around there. Mr. Marlow, I think, was with me when I was talking with him.

Q. 128. Was Mr. W. F. Niedringhaus there at that time? A. No, sir.

Q. 129. Was there anybody except Mr. Blackmon representing the company at that time?

A. No, sir; there was nobody except Mr. Blackmon and Mr. Ab. Niedringhaus.

Q. 130. Was Mr. Ab. Niedringhaus taking any part in this conversation? A. No, I don't think he was.

Q. 131. Was this the day when he was intoxicated and made the remark Mr. Marlow spoke about?

A. It was the day he was intoxicated.

Q. 132. I wish you would state to the stenographer what that remark was; I don't think it was put in Mr. Marlow's testimony.

By Mr. CULLEN.—We object to it for the reason that it isn't shown that Mr. Ab. Niedringhaus had anything to do with these cattle at that time or was authorized to make any assertions with reference to them.

(Sustained.)

By the MASTER.—Ruling reserved.

Q. 133. You may state, Mr. McNamara, what he said?

A. He said—he was very drunk—he drove up there in a buggy and took out a bottle of whisky and asked me to take a drink of it, and I refused, and he held his bottle up and said it would be a damned cold day when a Niedringhaus got left; that is about the exact words that he said.

Q. 134. Did these remarks make any impression upon your mind in connection with the cattle delivery?

By Mr. CULLEN.—We object to any impression that was made on his mind or anything with reference to that.

(Sustained.)

By the MASTER.—Ruling reserved.

A. Yes, it did; I couldn't understand why he should make the remark. Mr. Marlow and I talked about it afterwards.

Q. 135. Did you make any effort to find out why the cattle were not delivered as they seemed to be there ready to be delivered? A. Yes, sir.

Q. 136. Were you able to? A. No, I wasn't.

Q. 137. Had any of the Niedringhauses come in on that day?

A. Yes, sir; Mr. H. L. Niedringhaus came in on that day.

Q. 138. When did the train arrive?

A. It arrived there about dusk; I think about six o'clock.

Q. 139. You had been in Oswego about how long on that day?

A. Got in there about eleven o'clock that same day.

Q. 140. Had you been able to do anything to get any deliveries or accomplish anything on the errand on which you came? A. No, sir.

Q. 141. When did Mr. Niedringhaus—where did you meet Mr. H. L. Niedringhaus?

A. Met him at Oswego at the station.

Q. 142. As he was getting off the train?

A. Yes, sir.

Q. 143. Where were you and Mr. Marlow going?

A. If he wasn't going to make that delivery, we were going on the railroad back to Big Sandy.

Q. 144. What transpired there?

A. I asked Mr. Niedringhaus when he was going to be ready to turn over, and he said maybe not for three or four days—maybe not for ten. I says all right, I will go home; he said he might come up to see me. The train only stopped there a few minutes; it was only a flag station.

Q. 145. Was that all that was said?

A. Yes, sir.

Q. 146. Do you remember making any inquiries as to why he wouldn't turn over? A. No, sir.

Q. 147. He said he wasn't ready to?

A. Yes, sir; he said he wasn't ready to turn over at that time, but probably would be in a week or ten days.

Q. 148. Did you receive any communication from

these people between the 14th and the 21st day of October, when you came down there? A. Yes, sir.

Q. 149. Is that Exhibit "B" and "C" that is introduced here?

(Witness handed papers, being telegram and letter marked by the master Exhibits "B" and "C," respectively.)

A. Received a letter and a telegram, I think: that is the letter and the telegram that were received.

Q. 150. Is the A. W. Niedringhaus named in the letter the one who has made this statement when intoxicated on the 14th? A. Yes, sir; the identical man.

Q. 151. And were these cattle that were here on the 14th, the same cattle that were covered in the letter Exhibit "B"? A. Yes, sir; the same cattle.

Q. 152. When did you next go down to Oswego after the 14th? A. About the 21st.

Q. 153. Both of you went down there together?

A. Yes, sir; Mr. Marlow and myself.

Q. 154. You have an attorney with you?

A. Yes, we had an attorney with us as far as Glasgow.

Q. 155. That was Mr. McIntire? A. Yes, sir.

Q. 156. Take any money with you?

A. Yes, sir.

Q. 157. What kind of money? A. Currency.

Q. 158. Legal tender? A. Legal tender.

Q. 159. To what amount?

A. Ten thousand dollars.

Q. 160. What time of the day did you get into the station of Oswego on your next visit about the 21st?

A. Well, it was between 11 and 12 o'clock; about noon.

Q. 161. Have any train or trains there to receive cattle?

A. Yes, sir; there was a train standing there when we got there.

Q. 162. Where was this herd at this time?

A. It was about three miles north of Oswego.

Q. 163. Whom did you meet there at that time representing the defendants for the purposes of delivery?

A. I met Mr. Blackmon and Mr. Albert Niedringhaus and a Mr. Sharp.

Q. 164. When did Mr. Sharp first begin to take any hand in the proceedings?

A. At the time that we made them a tender of the money that we would owe them if they turned over all the cattle and horses to us.

Q. 165. This was after you had gotten all the cattle out of the last bunch that they were willing to turn over to you? A. Yes, sir.

Q. 166. Who officiated in the matter down to that time or acted for the company up to that time?

A. On this particular bunch of cattle?

Q. 167. Yes, sir. A. Mr. A. W. Niedringhaus.

Q. 168. Now, will you state in your own way what transpired in the delivery of these cattle after you got down there to Oswego?

A. As soon as I got to Oswego, Albert Niedringhaus came to me and asked me how many cattle I wanted to receive that day, and I told him we would receive all we could get—that trainload anyway, and he asked me how many cattle I intended to load on the train; I told him about 600; he gave us—he turned to Mr. Blackmon and told Mr. Blackmon to get the cattle. They went out after the cattle and my man went with them—one of them.

Q. 169. Who was your man?

A. Herman Knoell.

Q. 170. Anything said about the class of the cattle?

A. They were all to be steers and spayed heifers or dry cattle.

Q. 171. What next transpired under your observation?

A. They went out and brought the cattle in and we loaded them.

Q. 172. Where were they brought to?

A. Into the station at Oswego.

Q. 173. How many?

A. Six hundred and twenty-five or six head.

Q. 174. Who participated in the loading of this herd of cattle; people representing The Home Land and Cattle Company?

A. Mr. Marlow and myself and Mr. Blackmon and Mr. Niedringhaus.

Q. 175. When was the loading concluded?

A. The loading was concluded at just about dusk.

Q. 176. When did the train leave?

A. Immediately after it was loaded.

Q. 177. Was there anything said that day concerning payment for this trainload of cattle?

A. No, sir; there was not.

Q. 178. Nothing whatever said to you or in your presence? A. No, sir.

Q. 179. Where did you go after completing the loading of the train? A. I went up to our tent.

Q. 180. Who went with you? A. Mr. Marlow.

Q. 181. Where did you take supper?

A. In our cook tent.

Q. 182. Who took supper with you?

A. Albert Niedringhaus.

Q. 183. When did Mr. Niedringhaus leave you that evening?

A. I think about half-past seven o'clock.

Q. 184. Was there anything said about payment while you were at supper?

A. No, sir; I gave him a receipt for that number of cattle as I always had done.

Q. 185. Had it been your custom to give a receipt for each trainload?

A. Gave a receipt for each trainload or for each delivery of cattle.

Q. 186. Was there any departure from the custom when it came to giving receipts for the cattle delivered?

By Mr. CULLEN.—To which we object, for the reason that custom cannot modify the terms of the contract.

(Overruled.)

By the MASTER.—Ruling reserved.

A. No, sir.

Q. 187. Did you see Mr. Niedringhaus any more that night after he left you—that night after supper?

A. I don't remember.

Q. 188. Have no recollection of it?

A. No, sir; I have not.

Q. 189. Did you see Blackmon any more that night?

A. After that time Mr. Blackmon had gone home, I think.

Q. 190. Was there anything said about the method of delivery the next day—what was to be delivered?

A. Yes, sir; they were to turn over the balance.

Q. 191. What was said about it?

A. It was talked over that day; Mr. Niedringhaus came to me and asked me when we wanted to get the cattle, and I told him I wanted to get them right away. I wanted a bunch for Fort Peck.

Q. 192. Was there anything said about the amount you wanted?

A. I told him I wanted about 300 head of steers and a few cows.

Q. 193. Was anything said as to where they were to be cut out?

A. Yes, they were to be turned over on the prairie.

Q. 194. Was anything said as to where the balance were to be turned over?

A. Yes, sir; the balance were to be brought to the stockyards and turned over.

Q. 195. So that evening it was talked over and understood where the balance was to be delivered the next day? A. Yes, sir; it was.

Q. 196. Was anything said that evening concerning the turning over of the horses?

A. I don't remember; I think there was, though.

Q. 197. Still you are not sure upon that point?

A. No, I am not.

Q. 198. Now, the following day what transpired as between yourself and Mr. Niedringhaus and Mr. Blackmon? When did you first get started and what was done under your observation?

A. When we got out to the herd in the morning, Mr. Blackmon and my foreman had the cattle all cut out.

Q. 199. That is, these cattle for the Fort Peck Agency? A. Yes, sir.

Q. 200. What happened after you got out to the herd?

A. I counted the cattle and started them off for the agency.

Q. 201. And then what happened?

A. And then Mr. Blackmon gave his men orders to take the others into the Oswego stockyards which they started to do at that time.

Q. 202. Was there anything said at the time these cattle started off for the Fort Peck Agency about a demand for payment? A. No, sir.

Q. 203. Or anything said by Mr. Niedringhaus or Mr Blackmon? A. No, sir.

Q. 204. When was the first time in the matter of this delivery that the question of payment was broached by

Niedringhaus or Blackmon or anybody representing the defendant?

A. It was about 10 o'clock in the day, about an hour after those cattle had been turned over to us for the Fort Peck Agency.

Q. 205. Now, what had transpired on this inventory here? You say Blackmon directed that the cattle be brought down to the stockyards?

A. Well, they were bringing the cattle down on their way.

Q. 206. Had they reached the stockyards at the end of the hour?

A. No, they had got very close though.

Q. 207. Now, tell what transpired when the cattle got this close to the yards?

A. Mr. A. W. Niedringhaus came to me—

Q. 208. Where were you?

A. I was in my cook tent.

Q. 209. Who was with you?

A. I think Mr. Marlow was but I wouldn't be positive.

Q. 210. Anybody else around?

A. Yes, the cook was there and my foreman.

Q. 211. Who was that cook?

A. His name was French, I think.

Q. 212. Herman Knoell your foreman?

A. Yes, sir.

Q. 213. Where is Herman Knoell?

A. At Big Sandy.

Q. 214. Where is French?

A. He is at Big Sandy, too.

Q. 215. Who came with Niedringhaus, if anyone came with him? A. No, I think he came alone.

Q. 216. Now, you may state what took place in the tent.

A. When he came into the tent he says, "Mac., let's settle up on these cattle, that have been received"; I sat down and gave him a receipt for 308 or 310 head of cattle, and I didn't pay any more attention to him. "Well," he says, "will you give me a draft?" and I says, "Might just as well make a settlement now," and I says, "I will turn you over to Mr. Marlow and he will do the figuring on it"; so they went to work figuring and found there was 457 head of cattle out, not including the horses.

Q. 217. Where did you count that number of cattle still out?

A. We included that in the part of the settlement we undertook to make.

Q. 218. Where did you get that number?

A. Well, Mr. Blackmon counted them.

Q. 219. And when you say the cattle still out, what do you mean? A. The 457 head.

Q. 220. They were all that remained of this last lot, was it, that you were then engaged in receiving?

A. Yes, sir.

Q. 221. Now, go ahead; you say you figured out 457 head of cattle and the horses; now what transpired between Mr. Marlow and Mr. Niedringhaus?

A. Mr. Marlow figured out what they would have

due them, leaving off the shortage on the steers—some 1,900 head—and made them a tender of the difference; it was something like nine thousand dollars.

Q. 222. How was the tender made?

A. It was made by handing the money over to Mr. Niedringhaus.

Q. 223. Before you?

A. Yes, sir; he was asked to count it, if I remember right.

Q. 224. Did he count it? A. No, sir.

Q. 225. What was this money that was turned over?

A. They were large bills principally, $100 bills and $50 bills.

Q. 226. Well, what were they with reference to this legal tender money that you brought down—was it that money or part of that money?

A. Well, the money that was offered to Mr. Niedringhaus?

Q. 227. Yes.

A. Why, I don't think I understand you.

Q. 228. I want to know whether the money that Marlow offered to Niedringhaus was part of the legal tender money that you say he had brought down with him to Oswego, or whether it was some different money.

A. No, sir; it was the same money that he had brought down.

Q. 229. Did Marlow say anything about the amount of money that was being offered him?

A. Yes, he told them what it was.

Q. 230. Did Mr. Niedringhaus count it?

A. No, he refused to count it.

Q. 231. Did Mr. Niedringhaus make any objection to the character of the money that was offered?

A. No, sir.

Q. 232. What did he say when the money was offered?

A. He said he didn't have any authority to make any kind of a settlement. He said all the authority he had was to receive pay for the cattle.

Q. 233. How was this shortage arrived at?

A. Well, we had—

Q. 234. Who arrived at it, Marlow or you—who figured it out?

A. Mr. Marlow figured it out; I knew of my own knowledge that it was about 1,900 head.

Q. 235. Well, what transpired after he said that he never had any authority except to collect pay for those cattle and couldn't adjust that shortage?

A. I don't remember.

Q. 236. What did Marlow say to that?

A. I don't remember.

Q. 237. Did anything further happen there that you recall?

A. Yes, sir; Mr. Sharp came up there and asked it we would take the horses, and wanted to know if we would take the horses.

Q. 238. How did Sharp happen to come?

A. I think Mr. Niedringhaus went after him.

Q. 239. Did Niedringhaus return with Mr. Sharp?

A. Yes, sir.

Q. 240. How long was this after the tender of the money?

A. I think Sharp was there when the tender was made.

Q. 241. When the first tender was made?

A. I think so.

Q. 242. Are you sure of that? A. No, sir.

Q. 243. Are you sure a tender of the money was made in Sharp's presence? A. Yes, sir.

Q. 244. But you cannot say whether this was the first or second tender?

A. No, sir; I think once when he was alone.

Q. 245. Was the same money tendered both times?

A. Yes, sir.

Q. 246. Was any objection made by Mr. Sharp as to the kind of money that was offered? A. No, sir.

Q. 247. What did Sharp say when he came up there and the tender was made to him?

A. He said he was there—admitted he was there representing these people and wouldn't agree to any such settlement as we wanted to make. He said he knew nothing about the terms of the contract or adjusting it.

Q. 248. What was the amount of money tendered with reference to the balance you had figured to be due in adjusting this steer shortage—how did it compare with the balance?

A. Well, that was the exact amount, as near as we could get at it, leaving out the steer cattle we didn't have.

Q. 249. Was there any objection made to the settlement on the basis of Marlow's figures? A. No, sir.

Q. 250. The objection was that they were not authorized to adjust the shortage?

A. Yes, sir; exactly.

Q. 251. Now, what transpired after Sharp had announced himself—what became of your four people in the tent?

A. Mr. Sharp asked us if we would receive the horses that day. I answered him that we would, and so he immediately sent his men after the horses.

Q. 252. What, if anything, had been said about turning over this 457 head of cattle?

A. They stopped them right there.

Q. 253. Who ordered them stopped?

A. I think Mr. Sharp did.

Q. 254. And his orders were obeyed?

A. Yes, sir.

Q. 255. Now, did you people make any demand for the 457 head? A. Yes, sir.

Q. 256. Who made it? A. I did.

Q. 257. Did they comply with it? A. No, sir.

Q. 258. What was your demand?

A. That they put the cattle into the corral and count them out to us.

Q. 259. And they wouldn't do it? A. No, sir.

Q. 260. And the cattle were stopped on the prairie?

A. Yes, sir.

Q. 261. Then what transpired?

A. They brought the horses there from the south side of the Missouri river and put them in the corral and told me to check up what I wanted.

Q. 262. Who told you to go in and check them out?

A. Well, I think Mr. A. W. Niedringhaus told me and Mr. Sharp too.

Q. 263. Did you do so?

A. Yes, sir; I went in and selected five hundred head.

Q. 264. Was the bunch of 700 there? A. No, sir.

Q. 265. How many were there? A. 583 head.

Q. 266. Did you count them? A. Yes, sir.

Q. 267. How many horses did you take out of that bunch? A. 500 head.

Q. 268. Where were the 457 head of cattle at this time?

A. Oh, a little way from the stockyards.

Q. 269. Did they afterwards bring them in?

A. No, sir.

Q. 270. Or attempt to deliver them to you or any part of them to you in any manner? A. No, sir.

Q. 271. What became of the cattle that day?

A. They were held all that day by their men.

Q. 272. Were you ready to receive the cattle that day? A. Yes, sir.

Q. 273. Now, proceed with the horse business after you had counted out this 500 head—what transpired?

A. Then we still offered—put them in separate corrals, this 500 head, and figured in the 457 head of cattle that were out a mile or a mile and a half from the track and went through the same tender that we had before in the tent.

Q. 274. Made another tender?

A. Made another tender.

Q. 275. After these horses had been cut out?

A. Yes, sir.

Q. 276. Offering to settle on the same basis?

A. Yes, sir.

Q. 277. Who made the tender?

A. Mr. Marlow.

Q. 278. To whom?

A. To Sharp and Mr. Niedringhaus.

Q. 279. Was it accepted or refused?

A. It was refused.

Q. 280. What then became of the horses?

A. The horses were immediately after that taken out of the corral, driven south again, I think, across the Missouri river.

Q. 281. Did you receive them?

A. They wouldn't turn them over to me; they took them away.

Q. 282. Did they say why they wouldn't turn them over?

A. Claimed I wouldn't pay them for them.

Q. 283. What did they demand?

A. They demanded that I pay for them right there.

Q. 284. Did they demand payment for them before they would turn them over?

A. I don't remember as to that.

Q. 285. Well, had they been turned over when they demanded payment?

A. Yes, sir; they counted them out to us.

Q. 286. Well, were they in your charge?

A. No, they were supposed to be in my charge, but I ordered them not to turn them out of the corral.

Q. 287. Who had handled the horses as they were turned into the corral? A. Mr. Blackmon.

Q. 288. Their man? A. Their man.

Q. 289. Had their man ever given up charge of them to your men?

A. Well, they counted them out; after I took out 500 head I supposed the horses I had were, therefore, our horses.

Q. 290. Well, were your men in charge of them or were their men in charge of them?

A. I guess I never was in charge of them.

Q. 291. Well, had they ever surrendered the control of the horses to you?

A. No, sir; they never had.

Q. 292. And while the horses were in the corral they made this demand upon you for a money payment?

A. Yes, sir.

Q. 293. What amount of money did they demand, how much per head?

A. $20 per head, the contract price.

Q. 294. And upon your refusing to pay them this price what did they do with the horses?

A. Ordered them turned out of the corral.

Q. 295. You forbid that? A. Yes, sir.

Q. 296. They paid no attention to you?

A. No, sir.

Q. 297. Who gave this order directing the horses to be turned out of the corral?

A. Niedringhaus, Sharp and Blackmon.

Q. 298. Were they turned out? A. Yes, sir.

Q. 299. By whom? A. By their men.

Q. 300. Did their horses remain?

A. Yes, sir.

Q. 301. Then what was done with the other horses?

A. They drove them south of the Missouri river.

Q. 302. All of them?

A. No, sir; I think they left 80 or 100 head.

Q. 303. Who took the horses, the 80 or 100 head?

A. Mr. Caldwell.

Q. 304. Their foreman? A. Yes, sir.

Q. 305. Any division in county lines at that point on the river?

A. I don't know whether there is or not. Don't know where the line is; I think the river is the line.

Q. 306. If the river was the line and these horses were across the river, they were on the south side of the river? A. Yes, sir.

Q. 307. What time in the afternoon was that done?

A. That was in the afternoon; oh, it must have been three or four o'clock.

Q. 308. Was this the 500 head or did they mix them up? A. Mixed them all up.

Q. 309. And out of the mix up they took this 80 or 100 head?

A. Mr. Caldwell took out the identical horses.

Q. 310. Did they take them out after the 80 or 100 head were turned out?

A. I don't know; I suppose it was after.

Q. 311. How was this 583 head made up? What did they do to get that number, to increase the number?

A. Turned all the horses they owned in there.

Q. 312. Left Caldwell and his crew without any horses at all? A. They had a few private horses.

Q. 313. But no company horses?

A. Yes, all the company horses were in there—all supposed to be.

Q. 314. What did Blackmon or the others do that were riding company horses?

A. Took the saddles off and turned them into the corral.

Q. 315. Everything that was supposed to belong to the company put into the corral? A. Yes, sir.

Q. 316. Were the horses ever brought back from across the river while you were there? A. No, sir.

Q. 317. What transpired in connection with the horses or cattle the following day?

A. Mr. Marlow and I left there immediately after they refused to turn the cattle over to us.

(It is admitted by the parties that the remaining herd of 457 head of cattle taken by the receiver appointed in that action were removed to Big Sandy and sold to McNamara and Marlow.)

Q. 318. Now, when the receiver got there what stock did he find? A. 457 head of cattle.

Q. 319. The horses were not there?

A. No, sir; they were across the river.

Q. 320. Yes, but none of the horses that you had

counted out, the 500 head, were there, so far as you know? A. I don't know.

Q. 321. Did you ever come back to Oswego after that in connection with this business? A. Yes, sir.

Q. 322. Did you meet any of these people there?

A. Yes, sir.

Q. 323. Have any talk with them?

A. Only in a general way.

Q. 324. Who did you meet?

A. Mr. Niedringhaus and Mr. Sharp.

Q. 325. What date?

A. Must have been about the 22d, I guess.

Q. 326. Anything of any importance transpire?

A. No, sir; I had no talk with them of any consequence.

Q. 327. How long have you been in the cattle business, Mr. McNamara, been connected with it?

A. Ten or twelve years.

Q. 328. You have had actual contact with the business in all this time? A. Yes, sir.

Q. 329. You have been among the herd?

A. Yes, sir.

Q. 330. Observed and conducted the business in all its practical branches? A. Yes, sir.

Q. 331. Are you able to tell us, as a cowman, when a round-up of a large band of cattle is closed up—when they finish up? A. Why certainly.

Q. 332. What is the process they go through, as to their wagons and supplies and men?

A. Always discharge their men, and pull their wagons in home, and put them away.

Q. 333. What do they do with their supplies?

A. Generally have them eaten up.

Q. 334. If they are not, what do they do with them?

A. I don't understand you?

Q. 334. Throw them away? A. No, sir.

Q. 335. Well, what do they do with them?

A. Generally use them.

Q. 336. Wagons cleaned out?

A. Yes, the wagons are usually cleaned out, and they always put them away, wherever they are going to winter.

Q. 337. What do they do with the stoves?

A. Put them away.

Q. 338. Is it generally customary, after having put them away, the wagons, outfits, stoves, etc., to bring them out again? A. No, sir.

Q. 339. Are you familiar with the range down around Oswego?

A. I have been over the range there somewhat.

Q. 340. How much of a round-up could be made with the horses that Caldwell had from October 21st to November 1st?

A. Couldn't do much; I wouldn't think they could do anything.

Q. 341. What kind of a round-up could they do with those remaining, the screenings of the herd?

A. I don't think they could do anything with the horses that were left. At that time of the year they were very thin.

Q. 342. Had you seen other outfits before; do you know how many wagons they generally take on a general round-up? A. Five or six.

Q. 343. Do you know how many they had left, after what you call the final delivery, after it had taken place?

A. My recollection is that they had paid off all of their men, except one small crew.

Q. 344. What was this crew engaged in?

A. Holding these cattle.

Q. 345. Are you able to say, from your own knowledge of what you saw, whether or not it was in fact their final delivery?

A. Yes, sir, it was; their general superintendent told me it was.

Q. 346. I am speaking now of your own knowledge, whether from what you saw you could say it?

A. Yes, they were through rounding up for that season.

Q. 347. What determines the value of stock cattle in the northern part of Montana, up there in that country? A. What determines the value?

Q. 348. Yes, what is the controlling factor?

A. The price of beef on the Chicago market.

Q. 349. Have you kept yourself informed of the price of beef in the Chicago market during the years 1897 and 1898? A. During what years?

Q. 350. During the years 1897 and 1898, and the years prior thereto? A. Fairly well posted, yes, sir.

Q. 351. Do you make it your business to watch the quotations? A. Yes, sir; I do.

Q. 352. Do you watch them sufficiently always to determine the bearing on the value of stock cattle on the range in Montana?

A. I don't understand the question.

Q. 353. Do you watch the Chicago quotations at least sufficient to keep yourself advised as to the value of range cattle on your range?

A. I am always supposed to.

Q. 354. How does the fluctuation or change of value of beef on the Chicago market affect the value of range cattle on your northern range?

A. Well, the higher beef is in Chicago on the market, the more stock cattle bring on the range.

Q. 355. And the rise of beef on the Chicago market means what?

A. Two or three dollars on beef, would represent probably one dollar on range cattle.

Q. 356. Is there any difference in the character of range stock in this country—are they graded by natives, dogies or Texas cattle?

A. Yes, sir; there is quite a difference.

Q. 357. What is the difference between natives, dogies and Texas cattle?

A. Natives are cattle bred in this country.

Q. 358. What are dogies?

A. Well, you could apply that to all North Dakota cattle.

Q. 359. Oregon and Mexican cattle too, couldn't you?

A. Yes, sir.

Q. 360. What are the Texas cattle?

A. The Texas cattle we don't consider near as good as our Montana cattle.

Q. 361. Well, how are the Texas cattle graded as between Texas and dogies?

A. Texas cattle are poorer cattle.

Q. 362. What are these N. Bar N. cattle?

A. The largest portion of them were Texas cattle.

Q. 363. What were the others?

A. The others were pretty much Montana cattle. The old cows and steers were Texas in that herd.

Q. 364. By steers you mean spayed animals, or steers straight?

A. All the spayed animals that were in that herd, they had raised themselves.

Q. 365. They were natives? A. Yes, sir.

Q. 366. Now, what was the difference in the year 1897, if there was any proportionate difference between the value of the natives and the Texans, in this N. Bar N. herd? A. The beef you are talking about?

Q. 367. Yes.

A. Well, the cattle in that herd would bring about eight or ten dollars less on the Chicago market than the Montana native cattle.

Q. 368. Now, I want to ask you, Mr. McNamara, whether the values of such cattle as are in this N. Bar N. herd, in that market in Northern Montana, had remained unbroken or had changed from the date of the

contract, the 27th day of May, 1897, when you made this contract, down to October 21st, 1897?

A. Stock cattle all over the State of Montana had increased about five dollars.

Q. 369. Had they made such an increase in this herd, in the value?

A. I think so; I think the cattle were worth five dollars a head more in the value than when we bought them.

Q. 370. How much—how did that increase continue, as to being sudden or gradual? A. It was gradual.

Q. 371. Have you any idea what occasioned it?

A. The high price of beef on the Chicago market, and the scarcity of stock cattle; a big demand for them.

Q. 372. Was there any change in the value from October 21st, 1897, down to and including the present season, to the close of the season of 1898?

A. Yes, sir; there was.

Q. 373. To what extent per head, if you can estimate it that way?

A. Well, the only way I can estimate it accurately was by the prices two years ago, and what it is now.

Q. 374. Well, that is what I want—your knowledge of the value of cattle in 1897, and up to the present time?

By Mr. CULLEN.—We object to that as being immaterial, the contrast between what the price of cattle were in 1897, and what they are paying for them now.

(Sustained.)

By Mr. WALLACE.—The question related to the close of the season of 1898, the contract extended, at least, as far as the close of 1898, and the plaintiffs' claim to a specific performance by delivery of 457 head of cattle is based particularly on the ground that the contract extended over a long period of time in which there was likely to be and was large fluctuations and increase in the value.

By Mr. CULLEN.—All of which is immaterial in the present action, this being an action for the specific performance of a contract, and not for the recovery of damages, either general or special.

By the MASTER.—Ruling reserved.

A. I think the value advanced in these two years, about twelve dollars a head.

Q. 375. How much of that advance has been since October 21, 1897? A. I think about half of it.

Q. 376. Now, how has the advance been since October 21st, 1897, as to being sudden at any one time, or as to being gradual? A. It has been gradual.

Q. 377. Do you know how many calves there were in this 457 head of cattle? A. 156.

Q. 378. Those were calves of the year 1897?

A. Yes, sir.

Q. 379. What were those calves worth in the spring of 1898? A. Twenty-one dollars.

Q. 380. Per head? A. Yes, sir.

Q. 381. What did the other animals in this herd of 457 head consist of, Mr. McNamara?

A. One and two year old steers, and one and two year old heifers and bulls.

Q. 382. What were those calves worth October 21st, 1887? A. Twenty dollars a head.

Q. 383. What was done with this 457 head when the receiver took them—where did they go to?

A. They were loaded into the cars and shipped to Big Sandy.

Q. 384. Where were they kept in the winter?

A. At Big Sandy.

Q. 385. On whose ranch?

A. On McNamara's and Marlow's ranch.

Q. 386. Fed with whose hay?

A. Fed with their hay.

Q. 387. With what number of other stock were they kept?

A. Probably with three thousand head of other stock; probably 3,500.

Q. 388. Fed all winter? A. Yes, sir.

Q. 389. Had you counted on feeding this 457 head of stock that winter, Mr. McNamara?

By Mr. CULLEN.—To which we object, as being immaterial, and not tending in any way to change or modify the contract.

By the MASTER IN CHANCERY.—Ruling reserved. (Overruled.)

A. Yes, sir.

Q. 390. Where did all the cattle go, other than the between eight and nine thousand head out of this herd that were shipped to Chicago market?

A. They went to Big Sandy on our ranches.

Q. 391. What selection of the cattle that went to Big Sandy to your ranches was made for winter feeding?

A. All the calves, and all the heifers one and two year olds we sent there.

Q. 392. About what number of this 457 head under this selection were fed during the winter, including the calves? A. Including the calves?

Q. 393. Yes, sir.

A. About three hundred head of them.

Q. 394. About what proportion of the total number of three thousand or 3,500 head that were fed on your ranches were N. Bar N. cattle, or cattle from this herd?

A. Fully one-half of them.

Q. 395. What preparation had you made for winter feeding on these ranches?

A. We had hay cut, and bought some hay in the fall; rented some pastures adjoining them, next to our own.

Q. 396. To what extent in acreage had you rented pastures?

A. Well, I don't know; a good many acres.

Q. 397. Give a general idea; we don't know whether it is one or a million acres.

A. Well, we have a pasture of about—do you want the pasture I rented?

Q. 398. I want about the total area in acres of the pasture that you had rented that winter. Don't want the actual number, but about the actual number, as near as you can come to it.

A. From a thousand to 1,200 acres; with the hay that was on it.

Q. 399. What was the amount of hay you bought beyond what you put up?

A. Oh, I guess three or four hundred tons.

Q. 400. What total of hay did you have in tonnage bought and put up?

A. We had in the neighborhood of three thousand tons of hay, when we started feeding that fall.

Q. 401. In making these preparations, had you had in mind or had you had any regard for the using of it in connection with the taking care of cattle out of this N. Bar N. herd that would come within the feeding classification which you have given?

By Mr. CULLEN.—To which we object, for the reason that these considerations, if any he had, were not communicated to the defendants at the time of making the contract, and cannot serve to change or modify the contract in any respect.

By the MASTER IN CHANCERY.—Ruling reserved. (Overruled.)

A. Yes, sir.

Q. 402. Is there any customary period of the year in which the business of contracting for, and delivering range stock in Montana and upon that northern range, transpires—takes place—any time in the year when you buy and deliver?

By Mr. CULLEN.—Objected to for the reason that the custom, if proven, could not modify the contract in any respect.

(Overruled.)

Q. 403. Did you buy at all seasons of the year, and deliver at all seasons of the year, midwinter and at every other time?

A. No cattleman buys cattle except in the spring.

Q. 404. Why didn't they buy and deliver in November, and December and January?

By Mr. CULLEN.—Objected to as immaterial.

(Overruled.)

By the MASTER.—Ruling reserved.

A. Our winter always commences in November on the range.

Q. 405. Well, what does the winter have to do with it?

A. It is impossible to handle cattle when it starts.

Q. 406. Could you have replaced by purchase and delivery on the range this 457 head—or bought a similar bunch of cattle, 457 head of stock cattle—at that time of the year? A. No, sir, we could not.

Q. 407. Have you been engaged, in any period of time, Mr. McNamara, in supplying beef to Indian agencies, or forts or posts? A. Yes, sir.

Q. 408. For what length of time?

A. For the past eight or nine years.

Q. 409. Constantly?

A. I think every year for the past seven or eight years.

Q. 410. What posts or agencies have you so supplied in Montana?

A. Blackfoot Agency, Fort Peck Agency, and the Belknap Agency, and Fort Berthold in North Dakota.

Q. 411. What sorts or condition of cattle do you so supply in this work, and for what purposes?

A. For beef purposes, and for breeding purposes.

Q. 412. Using what class of cattle? A. For beef?

Q. 413. Yes, sir. A. Dry cows and steers.

Q. 414. And for breeding purposes?

A. One and two year old heifers.

Q. 415. And calves? A. And calves, yes, sir.

Q. 416. From what source, do you, in your business, get your supplies to furnish these animals in this Indian work? A. Get them by buying herds of cattle.

Q. 417. How far in advance do you make provision for this source of consumption that you mention?

A. Twelve months, generally.

Q. 418. You may state whether or not in the purchase of this herd of N. Bar N. cattle, you were buying them for the purpose of supplying this demand in your business, partly or wholly.

By Mr. CULLEN.—We object to the question, for the reason that it does not appear by the testimony of this witness, or any other, that the purpose plaintiffs had in purchasing was communicated to the defendant at the time the purchase was made, and the same cannot be received in evidence so as to modify in any respect the contract then made.

(Overruled.)

By the MASTER IN CHANCERY.—Ruling reserved.

A. Yes, sir.

Q. 419. To what extent in this supply business that you have mentioned did you use cattle out of this herd as you have contemplated?

A. I think about nineteen hundred head.

Q. 420. Consisting of what class of animals from the herd?

A. Steers and cows, and one and two year old heifers and bulls.

Q. 421. What, if any, part of this 457 head in suit in this action did you so use in supplying that demand?

By Mr. CULLEN.—Objected to as immaterial, for the reason that it does not appear that the demand could not have been supplied without the use of this 457 head in question.

(Overruled.)

By the MASTER IN CHANCERY.—Ruling reserved.

A. Used about 300 head.

Q. 422. At what agencies, if you know?

A. Fort Berthold and Fort Belknap.

Q. 423. Could you have bought and had delivered to yourself on the range, at that season of the year—that is, after October 31st, or during the winter following—the winter of 1897 and 1898, cattle to have replaced these cattle for such use at all?

By Mr. CULLEN.—Objected to, for the reason that it does not appear that there was any necessity for the purchase of such cattle, for the purposes named.

(Overruled.)

A. No.

Recess until 2 o'clock P. M.

Direct examination of Mr. McNamara continued.

Q. 424. Could the lack of this 457 head of cattle, or the three hundred head that you used after the winter for Indian purposes, have resulted in any damage to your firm? A. Yes, sir, it could.

Q. 425. Would that damage have been slight or considerable? A. It would have been considerable.

Q. 426. How would you estimate it, or determine it in money?

A. Well, I am unable to determine it in money—what the loss to us would be.

Q. 427. Could it be estimated or determined in money? A. I don't think so.

Q. 428. Did you have any talk with Loss Blackman, the manager of the defendant cattle company, concerning the number of head they had gathered the shipped in the year 1898? A. Yes, sir.

Q. 429. Out of this N. Bar N. herd?

A. Yes, sir.

Q. 430. When and where did it take place?

A. It took place in this building, I think on the 30th day of November.

Q. 431. 1898? A. 1898, yes, sir.

Q. 432. It was along after the close of the shipping season? A. Yes, sir.

Q. 433. What, if anything, did he say about it?

By Mr. CULLEN.—To which we object, as being immaterial.

(Sustained.)

By the MASTER.—Ruling reserved.

A. He said that they had gathered and shipped nearly 600 head, or his exact words were "less than six hundred head."

Q. 434. Do you know the whereabouts of the ranges of this defendant cattle company Mr. McNamara?

A. Yes, sir.

Q. 435. Do you know the improvements that are on it? A. Yes, sir.

Q. 436. You have seen them have you?

A. Yes, sir.

Q. 437. Have you had anything to do with the construction of similar improvements—buildings of like kind? A. Yes, sir.

Q. 438. Have you learned what it costs to construct them, and what they are worth after they are constructed?

A. I have a general idea what it would cost to build buildings of that kind.

Q. 439. What in your opinion were these buildings worth in that locality in October, 1897?

A. I wouldn't consider them worth very much. They were in a tumble down and bad shape—the dwelling-house and other buildings there.

Q. 440. That includes such buildings as they had around their pasture, does it?

A. The buildings were all about the same.

Q. 441. How about the fences?

A. The fences were in about the same condition.

Q. 442. What value would you put upon them all?

A. I wouldn't value them at over $1,500.00 or $2,000.00.

Q. 443. Does a range privilege have any value, such as belonged to the N. Bar N. people?

A. No, sir, there isn't such a thing as a range privilege in Montana, other than people have the same right to the range as The Home Land and Cattle Company people would have.

Q. 444. When they sold out their brand, and all their cattle, they ceased to enjoy their use of it?

A. Yes, sir.

Q. 445. What, in your opinion, was that band of horses worth that were brought into that corral, take them all through?

By Mr. CULLEN.—I object to that as immaterial, and not embraced within the issues in this case.

(Sustained.)

By the MASTER IN CHANCERY.—Ruling reserved.

A. The horses wouldn't sell for more than twelve dollars a head out of that herd.

Q. 446. What have you to say, Mr. McNamara, as to your readiness, and that of your co-complainant, or the firm of McNamara & Marlow, during or since October, 1897, and at all times during the year 1898, to go ahead and perform your part of that contract?

By Mr. CULLEN.—Objected to, for the reason that they refused to perform it on the 22d day of October, 1897.

(Overruled.)

By the MASTER IN CHANCERY.—Ruling reserved.

A. We were always ready to carry out our part of the contract.

Q. 447. What request or demand, if any, did you make of the defendants, or either of them, that they, in the year 1898 should continue the performance of this contract?

(Overruled.)

By Mr. CULLEN.—Objected to, for the reason that they refused to perform their contract on the 22nd day of October, 1897.

By the MASTER IN CHANCERY.—Ruling reserved.

A. We wrote them a letter, demanding that they turn over the cattle to us, as provided for in the contract.

Q. 448. Is that the letter, Exhibit "E," introduced in evidence in this case?

A. Yes, sir, that is the letter that we wrote to them, or a copy of it.

Q. 449. What have you to say as to whether Exhibit "F" is the response made by the defendant cattle company to your letter? A. This is their response.

Cross-Examination.

(By W. E. CULLEN Esq., of Counsel for Defendants.)

Q. 1. Did you meet Mr. Van Blarcom more than once?

A. Never met him but once.

Q. 2. Where was that? A. St. Louis.

Q. 3. At the National Bank of Commerce?

A. Yes, sir.

Q. 4. How did you happen to go there, Mr. McNamara, to meet Mr. Van Blarcom? A. Yes, sir.

Q. 5. What, if any, conversation did you have with him at that time about this contract?

A. I asked him if there would be any shortage of steers on that contract, whether he would make it good or not according to the terms of the contract. He said he would give me an answer at two o'clock on that day—it was in the forenoon—that he wanted to have a talk with Mr. Niedringhaus.

Q. 6. Was that all the conversation that you had with him regarding the contract?

A. He said that—No, I don't think it was.

Q. 7. What else occurred?

A. He said that his understanding was that he was to live up to the contract, as it had been assigned to them, and would do so.

Q. 8. Yes, when did he say that?

A. About two o'clock in the afternoon of the day that I was in St. Louis.

Q. 9. When was that?

A. I think it was in August, 1897. I think it was in August; I am not positive as to the date. I never was there but once and it was the time I was in St. Louis.

Q. 10. And you think that was in August?

A. I think it was in August, yes, sir.

Q. 11. Can you give us any idea what time in August it was?

A. I can get some reference, I think, and give you the

exact date. I think I can; I think I can do it now by having Mr. Marlow look over the books.

Q. 12. You think that at the time this contract was made you reached Chicago on the morning of the day the contract was made? A. Yes, sir.

Q. 13. You went directly to Rosenbaum Brothers office near the stockyards from the hotel?

A. Went directly from the depot.

Q. 14. What time did you arrive that morning?

A. I think we got to Mr. Rosenbaum's office at ten o'clock that morning.

Q. 15. What time did you arrive in Chicago.

A. About nine o'clock.

Q. 16. Did you have any baggage? A. Yes, sir.

Q. 17. What, a small valise? And took that with you to the office? A. No, sir.

Q. 18. What did you do with that?

A. Sent it to the Auditorium Annex.

Q. 19. You think that both of the Mr. Niedringhauses were there when you arrived at Rosenbaum's office?

A. I met them there that morning after I arrived.

Q. 20. Were they there then when you got there or did they come afterwards?

A. I am not positive as to that.

Q. 21. Who was present at the making of this contract besides yourself and the Messrs. Niedringhaus?

A. Mr. Joseph Rosenbaum.

Q. 22. He was the gentleman that you had a conversation with in Miles City about the purchase of these cattle previously, was he? A. Yes, sir.

Q. 23. *He have* anything to do with the making of this contract? A. No, nothing; no, sir.

Q. 24. Took no part in the negotiations?

A. I think that he was working in the interest of Niedringhaus, in the way of getting a commission if he could sell the cattle. Understand, I don't know this; I think he was.

Q. 25. Now did he take any part in the negotiations which took place between yourself and Mr. Niedringhaus for the purchase of these cattle—Mr. Joe Rosenbaum?

A. I don't know that I exactly understand you, Judge.

Q. 26. Did Mr. Rosenbaum have anything to say during the time that you were negotiating the purchase of these cattle with reference to it?

A. Yes, he was talking about the purchase of these cattle in a general way.

Q. 27. He was there all the time you were engaged in arranging the terms of your contract, wasn't he?

A. I don't know; he was there some of the time but I wouldn't be positive how much.

Q. 28. How long did it take to fix up this contract?

A. Do you mean the writing of the contract or completing the sale?

Q. 29. No, from the time you went there?

A. We completed the sale about one o'clock.

Q. 30. Got there about ten? Take any lunch?

A. Yes, sir, we took lunch and immediately after the lunch the sale was completed.

Q. 31. The contract was drawn and signed at once?

A. Not directly, it took some time to draw the contract.

Q. 32. But the trade was completed right after that?

A. Yes, we might have been to lunch a little while, and it may have been a little after one o'clock.

Q. 33. When did you leave Chicago after the completion of the contract? A. Next day, I think.

Q. 34. That would be the 28th, wouldn't it?

A. Yes, sir, that is my recollection, that we didn't delay there only that one day.

Q. 35. What was the price of beef in the market on that day, the 27th day of May, 1897?

A. I cannot say exactly.

Q. 36. Mr. Rosenbaum is one of the brokers at the Chicago stockyards, isn't he?

A. He is a very large broker.

Q. 37. Well, one of the largest in western beef?

A. Yes, I think he handles more western beef than any other man in the Chicago Stockyards.

Q. 38. Didn't you make any inquiries as to the price of beef of Mr. Rosenbaum?

A. I don't think I did; beef at that time of the year cut very little figure with range cattle.

Q. 39. Yes, I understand that, but you hadn't been in Chicago for some time?

A. I had been there two weeks before that.

Q. 40. Did you make any inquiry as to beef then?

A. Only generally I had seen the market quotations.

Q. 41. Well, what was about the market price about May 27th, 1897 for beef in the market?

A. Well, beef in the market was about from $3.65 to $5.25 or five cents. But, understand, that wasn't range beef.

Q. 43. What kind of beef was it?

A. Corn-fed beef.

Q. 44. That was worth a little more than range beef, wasn't it? A. They are so considered.

Q. 45. When did you ship the first load of cattle to Chicago out of this N-N herd? A. In July.

Q. 46. What time in July, Mr. McNamara?

A. I don't remember the date.

Q. 47. You personally conducted the cattle business of McNamara and Marlow during the season of 1897 up till September, didn't you? A. Yes, sir.

Q. 48. What was your first shipment to Chicago out of this herd? A. Beef cattle?

Q. 49. Yes, how many? A. I don't remember.

Q. 50. Haven't you the figures right here where you can get at them? A. I think so.

Q. 51. Well, will you refer to your books and tell us how many you shipped in your first shipment?

A. I don't think I shipped any of those cattle in July; I think we commenced shipping in August.

Q. 52. You want to amend your answer then in that respect? A. Yes, sir.

Q. 53. At what time in the year is the market usually best for range stock in Chicago? Range beef?

A. It varies considerably

Q. 54. It does?

A. Yes, some years it is best in July and August and other years it is best in October.

Q. 55. How was it in 1897?

A. The first shipment about the same.

Q. 56. When did your first shipment from the N-N herd reach Chicago?

A. Why they should reach Chicago about the 16th or 17th of August.

Q. 57. Did you get the market price for those cattle?

A. I think so.

Q. 58. What did you get per hundred pounds for them? A. About four cents.

Q. 59. Now, when did you make the last shipment from that herd? A. To Chicago?

Q. 60. To Chicago.

A. About the first of October.

Q. 61. How many did you ship at that time?

A. Shipped all the beef there was there that was fit to go. I don't know how many.

Q. 62. How many? A. I don't know.

Q. 63. In your sale of about the first of October how many did you sell from this herd?

A. Sold about 800.

Q. 64. How did those compare in quality with those you first shipped?

A. They were about the same quality and the same class of cattle.

Q. 65. Weren't the first shipped a little thinner than those shipped last?

A. I don't think so; no. I think they were just as good as the last cattle.

Q. 66. What did you get for that lot of cattle?

A. Got about four cents for the best of them.

Q. 67. Well, all around what would it average?

A. Average about 3.90

Q. 68. Average about 3.90?

A. Yes, the steers, yes, sir.

Q. 69. Did you give me the average of your first shipment or the top price for your best steers?

A. I gave you about what they were selling for.

Q. 70. About the average?

A. Yes, they were selling for about—average about 3.90 to four cents, I think.

Q. 71. How many cattle were in the first shipment, did you say—did you give the number?

A. No, sir; but I guess I can, though. On the 12th of August, 507 head; on the 14th, 483 head, and again on the 14th, 476 head.

Q. 72. That is all part of one shipment?

A. That is all one shipment, yes, sir.

Q. 73. When had those cattle been received from the defendant company?

A. They were receiving them in the stockyards at Oswego all day.

Q. 74. Then they were loaded and shipped directly to Chicago? A. Yes, sir.

Q. 75. When was the first delivery of cattle under that contract made by the defendant?

A. I think a small delivery was made to me on July 1st. July 1st the first delivery.

Q. 76. How many were delivered then?

A. About 230.

Q. 77. What was done with those cattle?

A. They were taken to Fort Peck Agency.

Q. 78. What kind of cattle were those—beef or stock cattle? A. 188 head of them were steers.

Q. 79. When was the next delivery made?

A. August the 12th.

Q. 80. No more deliveries until August the 12th, eh?

A. That is my recollection about it.

Q. 81. And then they delivered altogether how many cattle?

A. There was turned over to us in that delivery running from—

Q. 82. August the 12th to the 15th?

A. About 3,400 head.

Q. 83. Those were all beef cattle, were they not?

A. No, sir.

Q. 84. How many beef cattle were there or how many stock cattle, either one, which ever is most convenient to get at?

A. I cannot give you that very accurately, I don't think. They are all mixed up here together, cows and steers together.

Q. 85. The total number you can give?

A. Yes, sir; 3,400 head.

Q. 86. Now, was that 3,400 head all paid for in one draft? A. Yes, sir.

Q. 87. How long does it take to run from Oswego to Chicago?

A. It takes about four days. To run cattle, you mean?

Q. 88. Yes, sir. A. Yes, sir.

Q. 89. Now, these train loads were shipped on the 12th and 14th you think at Oswego? A. Yes, sir.

Q. 90. And it would take them four days to get to Chicago? A. Yes, sir.

Q. 91. And so it wasn't until four days afterwards that you made any sales in Chicago? A. No, sir.

Q. 92. Were those cattle sold promptly on their arrival? A. Oh, yes.

Q. 93. Always? A. Yes, sir.

Q. 94. Now, when did you next receive cattle from these parties on this contract after these lots on the 12th and 14th of August? A. Well, about August 18th.

Q. 95. Four days later? A. Yes, sir.

Q. 96. You received all those cattle personally, did you not? A. Yes, sir.

Q. 97. How many did you receive on August 18th, all told? A. I can't tell exactly.

Q. 98. Just approximately.

A. Received from August 18th up, including the 22d, about 3,800 head.

Q. 99. Were you at Oswego from the 18th to the 22d?

A. From the 18th to the 22d?

Q. 100. Yes, sir. A. Yes, sir; I was there.

Q. 101. Had you been there since the 14th, or did you return there—return home again?

A. No, sir; I wasn't there between shipments; I never stayed there, only when I was receiving cattle there.

Q. 102. Then you stayed there from the 18th to the 22d?

A. I was there on the 18th and on the 22d.

Q. 103. On the 18th and on the 22d?

A. Yes, sir; in the meantime I was at Oswego.

Q. 104. At Oswego all the time?

A. Yes, sir; between the 18th and the 22d.

Q. 105. Now, did you pay for these cattle in one draft?

A. Yes, sir.

Q. 106. When was that draft given?

A. It was given immediately after the cattle were received and shipped.

Q. 107. Now when did you next receive cattle under this contract? A. September 2d.

Q. 108. September second was the next receipt?

A. Yes, sir.

Q. 109. How many cattle were received then?

A. On September 2, 3, and 4th there was 2,350 head received.

Q. 110. When was payment made for those cattle?

A. When was payment made?

Q. 111. Yes, sir.

A. Immediately after the cattle were gotten.

Q. 112. Now, when was the next delivery?

A. About September 30th.

Q. 113. Did that extend over more than one day?

A. Yes.

Q. 114. How many days did that extend over?

A. September 30th to October 2d.

Q. 115. How many cattle were delivered at that time?

A. About 1,600 head.

Q. 116. When was payment made for those cattle?

A. After the cattle were received.

Q. 117. How long after?

A. Long enough for me to get home and report the number of cattle.

Q. 118. Whom did you report the number of cattle to? A. Reported it to my bookkeeper.

Q. 119. Where was your bookkeeper?

A. At Big Sandy.

Q. 120. So that you then made payment for the cattle? A. Yes, sir.

Q. 121. Do you remember what data you gave him?

A. No, sir; I do not.

Q. 122. Then prior to October 21st and 22d, for all the cattle you had received under this contract, you had issued five drafts, had you?

A. I don't remember the number.

Q. 123. How many had you issued?

A. I had issued one draft for each delivery of those cattle.

Q. 124. You had previously paid for the first bunch that you had sent to the Fort Peck Agency?

A. No, sir; never paid for those cattle, till a month after I had received them.

Q. 125. But you made a separate draft for that bunch of cattle? A. No, sir; I did not.

Q. 126. How were those paid for?

A. They were paid for with the cattle I received on August 12th.

Q. 127. So, then, there would be four drafts if you were correct as to the time of payment and the amounts paid for?

A. No, I think these cattle were paid for on or about the 29th of July.

Q. 128. What makes you think that now, Mr. McNamara?

A. Because I find that we received some cattle there about that time but no shipments to Chicago. Received some stock cattle along about the middle of July; and at that time I paid for the two hundred and thirty odd head that I had taken to the Fort Peck Agency on July 1st.

Q. 129. Then if you are correct about the times of payment there was five drafts in all?

A. I don't remember the number of drafts they were paid for on the delivery of the cattle.

Q. 130. But you are not able to state the number of drafts paid?

A. No, I am not. If it is important I can find it.

Q. 131. Going back to this interview with Mr. Van Blarcom, this letter that was produced shows it to have been August the 26th? A. Yes, sir.

Q. 132. Up to that time about how many cattle had been delivered under this contract?

A. Up to what date?

Q. 133. August 26th?

A. Well, I'll have to go to figuring. About 11,000 head.

Q. 134. Of that 11,000 about how many were steers and spayed heifers?

A. I can give you an exact statement of the number with a little time to do it. I can do it, but it will take me too long to figure it out, but I can give you the exact statement of it.

Q. 135. Very good; I would like to have an exact statement of it? A. Yes, sir.

Q. 136. You will supply it later? A. Yes, sir.

Q. 137. Now, had there been any correspondence between you and Mr. Van Blarcom about any shortage in cattle or anything about this contract? A. No, sir.

Q. 138. Where did you go from to St. Louis?

A. *Went from* Big Sandy.

Q. 139. And you went for the purpose of seeing about this shortage did you? A. Yes, sir.

Q. 140. At that time what was there to indicate to you that there would be any shortage?

A. That there would be any shortage?

Q. 141. Yes, sir.

A. Mr. W. F. Niedringhaus told me that in the future he would prefer that I would pay for the cattle every day as he turned them over, and when he told me that I couldn't see what reason he had for it other than to keep these cattle cleaned up there all the time, and at the end

of the season rob us out of the money that was due us. That was my reason for going to St. Louis.

Q. 142. Afraid of being robbed?

A. Afraid of being robbed out of the money that was due us under the cattle contract.

Q. 143. How long were you in St. Louis?

A. One day.

Q. 144. Now, when was it that Mr. Niedringhaus had this conversation with you?

A. It was the day before I started for St. Louis, or the same day.

Q. 145. Well, what day did you start for St Louis?

A. I don't know the date.

Q. 146. How long had you been in St. Louis before you called on Mr. Van Blarcum?

A. Called on him immediately after getting in there.

Q. 147. You had gone directly then from Big Sandy to St. Louis?

A. Yes, sir; I went directly.

Q. 148. Say you didn't stop over anywhere?

A. No, sir, if you call going by the way of Chicago direct; that is the way I went.

Q. 149. Did you stop over in Chicago?

A. Stopped in Chicago one day; got in there in the morning, and went out in the afternoon; was there part of the day.

Q. 150. Now, how long does it take to go from Big Sandy to St. Louis by way of Chicago stopping there a day? A. I think about seventy-two hours.

Q. 151. Where was it that Mr. Niedringhaus had this talk with you?

A. In the Traders' store at Oswego.

Q. 152. And that was the same day you started or the day previous, you say?

A. It was right soon after that; I think it was the next day.

Q. 153. What were you doing at Oswego at that time?

A. Had been receiving cattle.

Q. 154. Had been receiving, when did you receive?

A. I had received that day that he told me.

Q. 155. After that you did pay for the cattle as they were received, did you not?

A. I don't know; no, I don't believe we did; I don't believe they wanted it. I don't know so much about the payment after that. Mr. Marlow was with me and whenever we are together Mr. Marlow generally looks after the financial part of the business.

Q. 156. Mr. Marlow didn't get down there until about the end of September?

A. I think so; I think Mr. Marlow was there after all the deliveries you are speaking about.

Q. 157. The same month?

A. Yes, sir; September 2d.

Q. 158. So that he is mistaken if he thinks he didn't get down there by September?

A. He knows exactly or he should know.

Q. 159. *Where you* on October 20th, 1897?

A. I think I was at Big Sandy.

Q. 160. Did you see Mr. Niedringhaus on that day?

A. I think I saw Mr. Niedringhaus.

Q. 161. Mr. W. F. Niedringhaus?

A. Mr. W. F. Niedringhaus on what date?

Q. 162. October 20th, 1897.

A. No, sir; I did not.

Q. 163. You didn't have any conversation with him on that date? A. No, sir; I don't think so.

Q. 164. Now, is the conversation which you have testified about as having taken place between yourself and Mr. Niedringhaus the one which you told Mr. Wallace took place about October 20th, or was there another conversation afterwards?

A. I didn't have any conversation with Mr. Niedringhaus on the 20th.

Q. 165. Did you have more than one conversation with Mr. Niedringhaus about paying for the cattle?

A. I don't exactly understand you, Judge, what you mean by paying for the cattle. Do you mean with regard to the draft?

Q. 166. You have testified that about August 22d Mr. Niedringhaus said that he preferred that you paid for the cattle when they were delivered; did you ever have any other conversation at any other time or place with Mr. Niedringhaus about the same subject?

A. No, sir; I don't think so.

Q. 167. Then his conversation took place at Oswego? Who was present at it besides yourself and Mr. Niedringhaus? A. No one.

Q. 168. Can you recollect the place in Oswego where you had this conversation?

A. In the Traders' store.

Q. 169. What led up to the conversation—what had you been talking about?

A. Mr. Niedringhaus told me that he had received a letter from the Bank of Commerce or from Mr. Van Blarcum, I don't know which he said, asking him to hurry up drafts a little faster for the cattle.

Q. 170. What did you say in response to that?

A. I didn't say anything. That is the reason that he demanded that drafts be made out on each delivery, which I told him I was prepared to do.

Q. 171. You have testified, now, to another conversation that took place about October 1st at Oswego between yourself and Mr. Niedringhaus; what led up to that conversation—who commenced it?

A. Mr. Niedringhaus—Mr. W. F. Niedringhaus.

Q. 172. What did he say?

A. He asked me how many cattle I thought they were going to be short on the steers of the ages of two and three up and spayed heifers, and I told him that I certainly thought the way things were turning out it would be two thousand head short. He said he didn't think it would, but that they would be short a thousand, and that he would pay us $20,000.00 and settle it; and I told him No. that I couldn't entertain that proposition, but that I would take $30,000.00 and settle it, provided he would keep his horses and not compel me to take his horses, and he told me he would give me an answer in the morning, which he did, declining the proposition.

Q. 173. There was nothing else passed between yourself and Mr. Niedringhaus?

A. Mr. Marlow was with me; he stood there while this conversation took place but didn't hear it, I don't think.

Q. 174. It was Mr. W. F. Niedringhaus with which you had this conversation about September 30th, wasn't it; H. L. Niedringhaus wasn't there?

A. It was Mr. W. F. Niedringhaus.

Q. 175. The president of the company?

A. Yes, sir.

Q. 176. Where did he find you the next morning when he returned? A. At the stockyards.

Q. 177. Was there anything further took place in that conversation except what you have narrated?

A. No, sir, there was not.

Q. 178. Nothing regarding the settlement for the cattle? A. No, sir.

Q. 179. You made no reply when he told you he wouldn't accept your proposition?

A. Yes, sir; I told him he was very much mistaken if he thought they wouldn't be short two thousand head.

Q. 180. And that ended the conversation?

A. Yes, sir.

Q. 181. The next conversation that you had with any representative of this company was with Mr. Blackmon, was it? A. I don't know whether—

Q. 182. This was October 1st; now, did you have any conversation between the time you had this conversation

with Mr. Niedringhaus and the one you have testified to as having had with Mr. Blackmon?

A. With regard to what?

Q. 183. With regard to these cattle.

A. In what respect?

Q. 184. In any respect.

A. I don't think I quite understand you, Judge.

Q. 185. Did you have a conversation with Mr. Blackmon with reference to the delivery of these cattle?

A. Why he was turning the cattle over to me himself. Mr. Blackmon was there as their representative and he and I always counted the cattle. We were always talking about the cattle when we were receiving them.

Q. 186. Had you received any cattle between October 2d and October 14th?

A. Between October 2d and October 14th, no, sir.

Q. 187. Your conversation with Mr. Niedringhaus was concluded on October 2d, wasn't it, on the morning of October 2d?

A. Yes, we had a talk that next morning about the next delivery of cattle—when it would take place. He said to me that morning that he would make the final delivery about the 14th.

Q. 188. That was Mr. Niedringhaus?

A. That was Mr. W. F. Niedringhaus.

Q. 189. Now, subsequent to that time did you have a conversation with Mr. Blackmon about this matter?

A. I think probably I did.

Q. 190. When do you think that took place?

A. I don't remember; in fact, I don't remember the conversation, but I wouldn't say that I didn't have it.

Q. 191. From October 2d to October 14th where were you?

A. I guess I was at Big Sandy. That is my home.

Q. 192. Where were you October 14th?

A. I was at Oswego.

Q. 193. Well, did you have any talk with Mr. Blackmon that day? A. Yes, sir.

Q. 194. Where did that take place?

A. It took place in front of the Traders' store, in the Traders' store and at the stockyards.

Q. 195. How did that conversation commence?

A. I asked him if he was ready to turn over his cattle and he said he was, but he didn't have any instructions to turn them over.

Q. 196. Tell you where the cattle were?

A. I knew where the cattle were.

Q. 197. Was that all the conversation you had with Mr. Blackmon on that occasion?

A. No, I don't think it was; but it was all with regard to the cattle.

Q. 198. He told you that he had no instructions to turn them over?

A. I says, "Well, I am here to get the cattle, Blackmon, and somebody should be here in charge of these cattle and know whether he wanted to turn them over or not." He said Mr. H. L. Niedringhaus would be there to turn the cattle over, but that he couldn't give me an answer until Mr. H. L. Niedringhaus arrived.

Q. 199. That was all of the conversation between you and Mr. Blackmon at that time?

A. Yes, all that I remember.

Q. 200. Was there anything said about the number of cattle that they had rounded up and were holding?

A. About 1,400 head.

Q. 201. Well, was that said?

A. Yes, sir, Mr. Blackmon told me how many they had.

Q. 202. Did he say when they had finished rounding up?

A. No, I don't believe he did; if he did I don't remember it.

Q. 203. Did he say where the 1,400 head were?

A. I knew where they were.

Q. 204. You did know where they were?

A. Yes, sir.

Q. 205. But he said nothing about it?

A. I don't remember; I don't think I asked him because I knew where the cattle were; because I could see them.

Q. 206. See them where they were being held?

A. You could see them about a mile from Oswego. My foreman was there and told me just where they were.

Q. 207. Do you know whether they received any cattle after that day or not?

A. Whether they gathered any?

Q. 208. Whether they gathered any or any were driven in? A. Yes, sir.

Q. 209. There were? A. Yes, sir; 17 head.

Q. 210. Where were they gathered from?

A. Gathered in from the bends of the Missouri River.

Q. 211. When was it that Mr. Albert Niedringhaus had got his keg full that you told Mr. Wallace about?

A. I don't know when he got it full; it was on the 14th that I saw him there.

Q. 212. Up to that time what, if anything, had Mr. Albert Niedringhaus had to do with the delivery of these cattle?

A. He was always assisting with Mr. Blackmon; also counted the cattle with Mr. Blackmon.

Q. 213. Do you know whether he held any official position in the defendant company?

A. I cannot tell.

Q. 214. Know whether he had any stock in the company or connection with it?

A. No, sir; I do not.

Q. 215. Who was Mr. Albert Niedringhaus?

A. He is a son of the president of the company.

Q. 216. How old a man is he?

A. I don't know; I should judge a boy not over twenty-eight, probably not over twenty-four.

Q. 217. I believe you said you declined to take a drink?

A. I certainly did; it was Indian whisky.

Q. 218. And the remark that he made with reference to its being a cold day when a Niedringhaus got left might refer to taking a drink.

A. I have no idea what he did refer to.

Q. 219. Now, I will ask you to restate as nearly as you can exactly what was said in the conversation between yourself and Mr. H. L. Niedringhaus when he arrived that evening.

A. I met him at the train, and told him that Mr. Blackmon had said to me that he was through gathering and asked him when he would turn the cattle over, that Mr. Blackmon didn't appear to know when the cattle would be turned over; Mr. Niedringhaus said he wasn't prepared to turn them over then, but probably might be in a week or ten days, and said, "I will probably come up and see you." I said, "All right; let me know when you are ready to turn them over," and I got on to the train and went home.

Q. 220. On the 21st day of October you reached Oswego about 11 o'clock, did you?

A. Yes, sir; I think that is about the time the train got there that day.

Q. 221. Who did you first meet connected with this defendant when you arrived, what officer or agent?

A. I met Mr. Albert Niedringhaus and Mr. Blackmon, and one Sharp was with them.

Q. 222. You were introduced to Mr. Sharp at that time?

A. Yes, sir; as a gentleman out there taking a hunt.

Q. 223. Where were the cattle sent to that you received on the 22d?

A. I think the cattle I received on the 22d went to Poplar.

Q. 224. How far is that from Oswego?

A. Oh, it's about thirty miles.

Q. 225. Who took these cattle to Poplar?

A. My men.

Q. 226. How many men did you have down there at that time?

A. I had three men there steady all the time.

Q. 227. Herman Knoell and your cook, and who else?

A. A fellow by the name of Bob Dye and a man by the name of Rose.

Q. 228. Three men beside the cook?

A. Yes, sir.

Q. 229. What time did you get those cattle started to Poplar? A. I think about ten o'clock.

Q. 230. On what date, the 22d?

A. Well, I think it was the 22d.

Q. 231. The cattle were driven to Poplar, they were not shipped? A. They were driven, yes, sir.

Q. 232. How long did it take to drive them down there, do you know?

A. It took a couple of days—two or three days; I don't remember. I didn't go with the cattle myself.

Q. 233. Mr. Albert Niedringhaus then came to your tent, did he, after the cattle were delivered on the 22d?

A. Yes, sir.

Q. 234. And he requested you to pay for the cattle that had been delivered that day and the day before?

A. Yes, sir.

Q. 235. You made no objection to that because of the fact that there was 457 head of cattle that had not been delivered as yet, did you?

A. We objected to paying him for these particular cattle in the way he wanted to be paid for them.

Q. 236. But you didn't object because there was 457 head of cattle on the prairie that hadn't been turned over to you?

A. No, sir; I don't think so.

Q. 237. Now, when Mr. Sharp came up there with Mr. Albert Neidringhaus what took place between yourself and Mr. Marlow and Mr. Niedringhaus and Mr. Sharp with reference to this matter?

A. Mr. Marlow went to work to figure up, figuring in all the cattle that we had taken on the 21st and 22d, figured in 457 head that were out and 500 horses at $20.00 a head, and then deducted the number of steers that they were short, which amounted to about 1,900 head, and offered them the difference between $38,000.00 and what the stuff came to which they refused to take.

Q. 238. What did they say about accepting it?

A. They said they had no authority to make any settlement with us at all.

Q. 239. Was that all that was said in that conversation?

A. I don't remember if there was anything more said.

Q. 240. Anything said about any breach of your contract or anything of that sort?

A. If there was I didn't hear it.

Q. 241. You were there all the time participating in the conversation? A. Yes, sir.

Q. 242. How large a tent is it that this took place in?

A. It is a tent 14 feet square; probably 14 by 16.

Q. 243. When was it that you counted the horses they brought up. A. The day they brought them in.

Q. 244. How did you count them?

A. How did I count them?

Q. 245. Yes, sir.

A. Strung them out in the corral and counted them in that way.

Q. 246. You didn't drive them through a gate, did you?

A. Yes, sir; drove them through gates and strung them out.

Q. 247. Were the horses all together when you counted them?

A. No, sir; I took 500 head of horses out of the entire herd and counted them as I took them out and kept them in a place by themselves.

Q. 248. When did you count the balance of them?

A. Just as soon as I had them counted.

Q. 249. Anybody else count them with you?

A. Not with me, no, sir; I counted them alone.

Q. 250. They were in a portion of the stockyards by themselves? A. Yes, sir.

Q. 251. Well, did you simply go in there and count them?

A. Yes, sir; I went in there and stirred them around and counted them. There was 83 head of them left.

Q. 252. Where was Niedringhaus and Sharp at that time? A. There were in the corral.

Q. 253. With you? A. No, sir.

Q. 254. You were alone when you counted those?

A. This 83 head?

Q. 255. Yes, sir.

A. Yes, sir; I counted those 83 head alone.

Q. 256. How long were those horses in the corral after they were separated?

A. Not very long; about half an hour, maybe an hour.

Q. 257. Did you go down to your tent again after they were turned out? A. No, sir.

Q. 258. Where was it that they demanded payment for those cattle? A. In the stockyards.

Q. 259. What was it that they said? Just repeat the conversation and tell us between whom it took place. Now about the payment only.

A. About the payment for the horses?

Q. 260. Yes, in the stockyards?

A. Well, after we counted the 500 head of horses out we got them separated and Mr. Marlow then made them the same kind of a tender that we had made in the tent before that.

Q. 261. Well, how did he do it?

A. By offering them the money. Legal tender currency.

Q. 262. Did he have the money with him?

A. Yes, sir.

Q. 263. Had it in his pockets?

A. Had it in his pockets. I don't believe he had it in one.

Q. 264. Did you see the money? A. Yes, sir.

Q. 265. Where was Mr. Niedringhaus and Mr. Sharp at this time? A. Right with us in the stockyards.

Q. 266. Mr. Marlow offered the money to them?

A. Yes, sir.

Q. 267. What did they do about it?

A. Wouldn't accept it.

Q. 268. Well, did that conclude the conversation about it? A. That is about all I heard about it.

Q. 269. Did you hear anything about a breach of contract then?

A. Well, I might have heard it; I wouldn't be positive. I think I told them they had broken the contract, and I am pretty sure they told me I had broken it.

Q. 270. You had considered that they had broken the contract?

A. I certainly considered they had broken the contract.

Q. 271. Well, how long was it after the offer was made before the horses were turned out?

A. It might have been a half an hour or an hour.

Q. 272. You were present at the time Niedringhaus and Sharp both ordered the horses turned loose?

A. I heard them give the order; yes, sir.

Q. 273. Where were your men at this time?

A. They were in the yard. Herman Knoell was the only man we had there at this time.

Q. 274. Herman didn't go with these cattle then?

A. No, sir.

Q. 275. How many men did it require to take these cattle to Poplar? A. It required about three men.

Q. 276. You had three men besides Herman Knoell?

A. Herman Knoell and three others; yes, sir.

Q. 277. How many men took these cattle?

A. I think three.

Q. 278. Three besides Herman or three with him?

A. I think I told Herman to get three men to take these cattle down; and I think he hired two men and sent one of his men down. I think there was three men altogether, that went with the cattle.

Q. 279. What did you learn—what do you know personally about the number of wagons that the defendant company had employed in making this round-up?

A. I saw a good many of the wagons.

Q. 280. When did you see them?

A. Saw them when they would come in from the round-up.

Q. 281. Whose wagons did you see?

A. I saw Mr. Caldwell's wagon, he was on the north side; he was a man that always helped with the cattle. A man by the name of Len Morrow—I saw his outfit, and Mart Hamby's.

Q. 282. Where did you see Mr. Hamby's outfit?

A. I saw Mr. Hamby's outfit when he pulled in. No, I didn't see his outfit; I saw his outfit when they were crossing the river.

Q. 283. Did you ever see Leavitt's outfit?

A. Yes, sir; I saw his outfit twice.

Q. 284. Was there another man across the river except Caldwell? A. Yes, sir.

Q. 285. Who was that?

A. A man by the name of Morrow, I think.

Q. 286. When was Morrow north of the river?

A. In the summer of 1897.

Q. 287. About what time?

A. I don't remember in the round-up season.

Q. 288. Did you see him there?

A. I saw him there; have been in his tent and ate at his camp.

Q. 289. I understand you to say that the price of stock cattle on the ranges is governed by the prices of beef on the Chicago market, is that correct?

A. To a certain extent.

Q. 290. To how great an extent is that true?

A. It is true to this extent that a man buying cattle generally buys for breeding purposes, and to raise for the Chicago market, and other markets where he can sell them; and the Chicago market being the biggest market in the world, governs the price as to beef cattle.

Q. 291. Don't the Chicago market fluctuate a good deal? A. Yes, sir.

Q. 292. Some months it is higher and some months it is lower?

A. Of course some months it is more and some months it is less.

Q. 293. Now, how do you make this estimate that a rise of two or three dollars per animal in the market raises the price of beef a dollar? I mean range cattle a dollar a head? A. How do I get it?

Q. 294. Yes, by what reasoning do you reach that deduction?

A. Well, in buying a herd of cattle a man will generally get one-third steers and dry cows and the other two-thirds would be stock cattle; it would add about a third then to the value of the cattle of what the rise was. I would figure it that way.

Q. 296. Now, what rise was there in the market for beef from the time you made this contract and November 1st, 1897?

A. There was a gradual rise that season from the time I made that contract up till September anyway. In other words, beef in May when we bought these cattle were selling on the Chicago market for a fairly good price for that season; and in August when we commenced shipping these cattle we commenced getting four or five dollars a head more than we expected out of these cattle. We figured it was a strong market all the way through.

Q. 297. Going to the season of 1898 now, Mr. McNamara, at about what price had beef been in the Chicago market?

A. I am not prepared to say. I haven't noticed the quotations of beef since October. I pay very little attention to the beef market in Chicago except in the month we shipped these cattle.

Q. 298. What months did you usually ship?

A. August, September, and October.

Q. 299. Take it in August, September and October this year; what would be the market prices of good Montana beef?

A. Good Montana beef sold from four cents to four sixty-five—good beef steers—the highest market since I have been in the business.

Q. 300. You say that no cattle man buys stock except in the spring of the year?

A. Well, they buy them at any time of the year for spring deliveries.

Q. 301. That is what you mean to be understood as saying? A. I think that is what I did say.

Q. 302. It is true that they buy in Oregon, Texas and elsewhere during the winter?

A. For spring delivery.

Q. 303. For spring delivery? A. Yes, sir.

Q. 304. You told Mr. Wallace that cattle had advanced between the time you made this contract and the 21st day of October at least five dollars a head?

A. Yes, sir.

Q. 305. Had there been a corresponding advance in the beef market in Chicago between those dates?

A. No, sir; there had not.

Q. 306. Then this advance was independent of the market?

A. Not exactly independent of it. It was occasioned by the shortage of stock cattle and a great rush of people from the east to buy she cattle to keep breeding with.

Q. 307. Do you know of any sales being made at the time you purchased these cattle of other parties?

A. I know some sales that could have been made.

Q. 308. Do you know of any sales that were made?

A. No, sir.

Q. 309. Between that time and October 21st do you know of any other sales being made by other persons?

A. I don't quite understand your question, Judge.

Q. 310. Between May 27th and October 21st, 1897, do you know of any sales having been made by other parties of stock cattle?

A. No, sir; I have none in my mind now.

Q. 311. During the season of 1898 prior to November 1st, 1898, do you know of any sales being made by other parties of stock cattle?

A. Only by hearsay; I don't know what other people are doing; I heard of sales.

Q. 312. You say that the calves of 1897 that were with this 457 head of cattle were worth about October 21st, $20.00 a head, do you?

A. Yes, sir; I did say that.

Q. 313. Do you know of any calves being bought or sold about that time?

A. I was offered twenty dollars for those calves.

Q. 314. Didn't you accept it?

A. I did not; no, sir.

Q. 315. When were you offered twenty dollars for them? A. About the 15th day of November.

Q. 316. By whom?

A. By a gentleman that lived in Illinois. He came up there to buy several carloads and made me an offer of twenty dollars.

Q. 317. Those same calves when a year old in the following spring would be worth $21.00?

A. Yes, sir.

Q. 318. What would it cost to winter them?

A. Oh, it takes a good deal.

Q. 319. Such a winter as 1897 and 1898 was?

A. Costs about a dollar and a half or two dollars.

Q. 320. How was that winter, Mr. McNamara, with reference to being an average winter or otherwise?

A. It was not an average winter. It was rather a hard winter for feeders. It was a long winter; had bad weather in November and bad weather in March.

Q. 321. Isn't there quite a loss in calves during the first winter as a rule? A. Not if you feed them.

Q. 322. Is there any loss if you feed them?

A. Very slight.

Q. 324. Well, you have had a long experience in the cattle business; what would you say the average loss would be during the winter?

A. Well, I should judge it would be from one to two per cent.

Q. 325. Doesn't the average loss of calves the first winter run as high as from three to five per cent?

A. That is on the range, I think.

Q. 326. That is on the range?

A. Yes, sir; they lose twenty-five per cent on the range.

Q. 327. These calves were all fed you say that winter? A. Yes, sir; they were all fed.

Q. 328. How many of these 457 head would you say you sold during the fall of 1897, or did you sell any of them? A. I didn't sell any of them.

Q. 329. When did you sell any of the 457 head turned over to you by Mr. Knoell?

A. Sold them in June, 1898.

Q. 330. When did Mr. Knoell turn them over to you?

A. Turned them over as soon as he got up to Sandy with them.

Q. 331. When was that?

A. That must have been about the 23d or 24th of October, I guess.

Q. 332. Do you happen to remember how many cattle the firm of McNamara & Marlow turned in in their assessment list of 1897? A. No.

Q. 333. Can you give us an idea about how many?

A. I cannot.

Q. 334. Do you know how many you turned in in 1898?

A. I think something like eight thousand—seven or eight thousand head; I am not positive as to that.

Q. 335. Do you know when the assessment list for 1898 was made? A. No, I don't; I don't remember.

Q. 336. Made in March, wasn't it?

A. I don't know; I paid very little attention to that.

Q. 337. If it was made in March you hadn't bought any cattle between November 1st, 1897, and the time of the making of this assessment list?

A. I don't know anything about the assessment list; I don't know when it was made. That is a part of the business I don't pay much attention to.

Q. 338. Who makes out the assessment list?

A. I generally give it to the bookkeeper—I usually

give the bookkeeper the figures, but aside from that I don't remember the date they were given. I gave him the figures myself.

Q. 339. Now, going back; if 8,000 head were returned for taxation you haven't bought any of that 8,000 between November 1st and the time you made the list, had you?

A. I don't know; I don't know anything about the list; I don't know when the list was made.

Q. 340. Did you buy any cattle between November 1st, 1897, and April 1st, 1898?

A. Between April 1st, and—

Q. 241. Between November 1st, 1897, and April 1st, 1898, did you buy any cattle that were delivered to you?

A. Had no cattle delivered to us; no, sir.

Q. 342. So that in 1898 if you returned 8,000 head of cattle for taxation you had that number of cattle?

A. Should have it.

Q. 343. In that number about what proportion would be cows and yearling calves?

A. In 8,000 head of stock cattle what proportion would be cows?

Q. 344. Yes, sir.

A. I would say one-fourth of the herd would be cows.

Q. 345. One-fourth of the herd would be cows. you think? A. I would say so.

Q. 346. And calves of that year how many?

A. I should think about one-fourth the cows in a herd of stock cattle that size.

Q. 347. This includes calves as well—what proportion would be cows and calves of that year?

A. Well, that is a hard thing to say for me. Some herds of cattle of that size—

Q. 348. No, but I am speaking of your own herd, Mr. McNamara.

A. I should say there would be 2,000 calves with that many cows if they were well cared for and bred right.

Q. 349. Two thousand calves; I think I said one-fourth of the herd. I said I think one-fourth of the herd would be cows.

Q. 350. Well, one-fourth of 8,000 would be how many? Would that be twenty-five hundred? How many cows and calves did you tell Mr. Wallace you had kept up and fed during the winter of 1897 and 1898?

A. I don't know what I did tell Mr. Wallace; I don't remember his asking me the question.

Q. 351. Well, you kept up some cows and calves during that winter in your fields and fed them hay?

A. Yes, sir.

Q. 352. You had three thousand tons of hay that you cut and about twelve hundred tons that you bought?

A. Oh, no.

Q. 353. How much did you buy?

A. Might have been two or three hundred tons.

Q. 354. You didn't buy, then, from a thousand to twelve hundred tons of hay? A. No, sir.

Q. 355. Then you had thirty-three hundred tons of hay put up in the fall of 1897?

A. Oh, some place between twenty-eight hundred and thirty-one hundred a good, strong three thousand tons.

Q. 356. Well, now, how many cattle, about, did you feed hay to that winter?

A. About thirty-five hundred head.

Q. 357. About thirty-five hundred head?

A. About that.

Q. 358. You didn't feed hay to anything except the weak cows and the calves?

A. Fed hay to everything we kept up.

Q. 359. Well, did you feed anything to anything except the weak ones?

A. We fed heifers and weak stock.

Q. 360. And in the spring of the year you didn't have hay enough to carry you through?

A. We bought some hay in the spring.

Q. 361. How much hay did you buy?

A. I think one hundred and five tons, if I remember correctly.

Q. 362. Now, of those four hundred and fifty-seven head, how many are you willing to say were kept up during the winter of 1897 and 1898?

A. There was 300 head of them and possibly more; I think there was more than 300 head of them kept up.

Q. 363. How many of this 457 head was cows?

A. 157 head—there was more than that there was some dry cows—probably 60 or 70 dry cows.

Q. 364. Those you didn't keep up?

A. Some of them we did. This bunch of stock had

been held there for some time; cattle had been getting away and had been caught again.

Q. 365. How long had they been held down there?

A. Well, they had been held down there for 20 days a lot of them. Across the river the cattle got scattered on them and got in the bends of the river most of them.

Q. 366. How many heifers were there in this 457 head about?

A. I don't remember. I classed the cattle when I got them.

Q. 367. How many heifers did you say, Mr. McNamara, two years old and upwards?

A. Oh, there was probably 60 or 70 head; I don't know positively.

Q. 368. Well, did you keep any of those heifers up that winter? A. Some of them.

Q. 369. How many of them?

A. I think nearly all of them. I think we kept all the heifers there was and all the yearling steers.

Q. 370. How many yearling steers were there, about?

A. Well, there was probably 50 or 60, or something like that; possibly something more. I am just guessing at this; I don't know.

Q. 371. Well, there was some bulls in the lot, wasn't there? A. Yes, sir.

Q. 372. How many of those were there?

A. Thirty-three.

Q. 373. What did you do with the bulls?

A. I kept them all up and fed them.

Q. 374. You always kept the bulls up in the winter time anyhow? A. Yes, sir; I kept the bulls up.

Q. 375. Now, what other cattle were there in this 457 head except those we have just been talking about, the 156 cows, 70 heifers and the bulls? There were some two year old steers, weren't there?

A. Yes, sir.

Q. 376. How many of those?

A. I don't know; they were just a common herd of stock cattle and nothing in there except cows; I couldn't say what they were without looking it up.

Q. 377. Then of the 457 head you think you fed at least 300 head that winter?

A. I am positive there was 300 fed out of that number.

Q. 378. Now, what of those 457 head that you afterwards turned in on your beef contract could you not have supplied from your own herd in 1898?

A. I don't know as I quite understand the question.

Q. 379. Well, I will give it in another way. What of the 457 head of cattle that we have been talking about did you turn in on your beef contract in 1898?

A. I turned in dry cows out of it.

Q. 380. How many?

A. All that there was.

Q. 381. How many were there?

A. I don't know how many there were.

Q. 382. Can you tell about how many?

A. Probably forty or fifty.

Q. 383. Now, were there not in your own herd more than that number of dry cows?

A. This was my own herd.

Q. 384. Yes, but had you not in addition more than that number in your own herd? A. Yes, sir.

Q. 385. What else did you turn into your contract?

A. All the yearling and two year old heifers.

Q. 386. Do you remember how many there were of those? And heifer calves?

A. Yes, I remember exactly how many there were.

Q. 387. After you had turned these heifer calves in, about how many of the same class of cattle had you remaining in your herd?

A. Lots of them, probably a thousand.

Q. 388. What else of this 457 head did you turn into your Indian contract?

A. I turned them all in pretty near but the cows and the one and two year old steers; all the heifers were turned in and all the heifer calves.

Q. 389. All the bulls were turned in?

A. All the bulls were turned in.

Q. 390. Did you have any bulls left after you had turned in your thirty-three head?

A. Well, the contract didn't call for more than the 33 head.

Q. 391. How many of the bulls did you turn in?

A. We always have bulls to raise calves.

Q. 392. How many bulls did you have after you had turned them into your beef contracts?

A. Probably two or three hundred.

Q. 393. Well, was there any of the 457 head except the dry cows, the heifers and calves and the bulls?

A. I don't think there was.

Q. 394. And all of those you could have supplied out of your own herd if you had not had the 457 head?

A. Not at the price.

Q. 395. Why not?

A. The cattle that I am raising myself are very much better cattle, and consequently on these Indian contracts I confine myself strictly to those N. cattle; I consider my cattle worth two dollars a head more than these N cattle.

Q. 396. Then it would have cost you two dollars a head more to fill these contracts with cattle you raised yourself?

A. No, sir; I couldn't have got the contracts with my own cattle. The contracts have to be bid low to get the contracts. If I had bid two dollars more I couldn't have got the contracts.

Q. 397. Suppose you had got the contracts at low prices and expected to fill it out of this N herd and could not do so, you could have filled the contract with a loss of two dollars a head?

A. Well, about that; from two to four dollars a head.

Redirect Examination.

(By Mr. WALLACE.)

Q. 1. You were asked concerning the drafts for the shipments that ended August 22d or the deliveries that ended August 22d. I think you stated to Judge Cullen

that you mailed the draft from Oswego. Do you recollect in connection with that memorandum as to the talk with Van Blarcum when you were in St. Louis on the 26th of August?

A. Yes, sir; I had that particular draft with me.

Q. 2. Well, did you mail that draft or carry it with you? A. I carried it personally with me.

Q. 3. And delivered it as soon as you got there?

A. Yes, sir.

At this point an adjournment was taken until Monday, January the 30th, 1899, at ten o'clock A. M.

HENRY N. BLAKE,

Master.

January 30th, 1899.

Mr. McNAMARA, recalled, testified as follows:

Direct Examination.

Q. 1. In your cross-examination, in referring to the factors that increased the price of range stock on the Montana range, you spoke of the price of beef in the Chicago market, and you added there were also other factors—you spoke of the purchase of stock by feeders; what did you mean by feeders?

A. Young cattle that people in Nebraska and Illinois would buy for the purpose of feeding for the market.

Q. 2. They were feeding them for what market?

A. For the Chicago market.

Q. 3. These young cattle were bought, taken east and fed, and by the eastern feeders taken to Chicago and sold? A. Yes, sir.

Q. 4. What effect did that have?

A. It made stock cattle very scarce and hard to buy in this country.

Q. 5. Why did it make them scarce?

A. Well, so many people were looking for them for that purpose.

Q. 6. There were not enough cattle to supply that demand—that was the reason? A. Yes, sir.

Q. 7. What effect did that have?

A. It had an effect on the price of all range stock during that year.

Q. 8. What effect, up or down? A. Up.

Q. 9. What other factors were there?

A. On account of the scarcity of stock cattle and the demand for them.

Q. 10. And also the price of beef cattle in Chicago was increased, was it not? A. Yes, sir.

11th Q. Judge Cullen at some length examined you and you had a book of shipments before you, concerning the delivery of the number of head delivered, and when the first lot were delivered and when the second and third, he cross-examined you as to whether there were five drafts and five deliveries. What have you to say as to your ability to give the number of drafts from memory—do you recollect about that?

A. No, sir; I did not assume to give it from memory.

Cross-Examination.

12th Q. What, in the parlance of the range, do you understand by the word "feeder"? Does it apply to the man who purchases the cattle, or to the class of cattle bought?

A. The class of cattle bought, and also the buyers.

13th Q. What class of cattle is denominated feeders?

A. Year olds, two year olds and three year olds.

14th Q. Steers or heifers?

A. Principally steers, but they buy heifers also for feeders, or have in the last two years.

15th Q. Spayed heifers?

A. No, sir. We have bought a good many of them in the last two years on account of the scarcity of stock.

16th Q. When did the market in this class of stock commence?

A. I never knew feeders to come here until 1897. They never came here before, that I know of.

17th Q. Who, if you know, was purchasing feeders in the year 1897 throughout this section of country?

A. I do not know the names of the people purchasing, but I do know that they were purchasing them.

18th Q. Did you sell any stock for this purpose?

A. No, sir; I refused to; I had an opportunity to do so.

19th Q. How many opportunities did you have?

A. I had several.

20th Q. Parties came to your place offering to buy stock? A. Yes, sir.

21st Q. When was this? A. In '97 and '98.

22d Q. What time in 1897?

A. In the summer time.

23d Q. You say you knew of sales being made, who made sales to these people of feeders?

A. Well, Mr. Mellick made some. I do not remember the names. There were a lot of sales, and lots of people trying to buy who could not buy.

24th Q. All this you know by hearsay, do you?

A. Not exactly; I know it is a fact.

25th Q. Were you present when any sale was made?

A. No, sir; I was not.

26th Q. And you only know it by what you were told?

A. I know there was a general demand for that class of stock. There were people trying to buy them.

27th Q. Do you know of this from people applying to you to purchase?

A. I know from other people and I saw advertisements for them.

28th Q. Where did you see advertisements?

A. In the "Stockgrowers' Journal."

29th Q. That is published in Miles City?

A. No, sir; in Chicago.

30th Q. How early in 1897 did you know of the purchase of this class of stock being made?

A. I don't remember how early; I know in August and September I had opportunities to sell several bunches of cattle of that class.

31st Q. You do not recall any sale made prior to that time?

A. No, sir; not in this section of the country?

32d Q. These people that applied to you, did they make you any offer?

A. They made me offers by the pound, not by the head.

33d Q. What was the offer per pound?

A. Four and four and a half per hundred.

34th Q. That was for one, two and three year old steers? A. Yes, sir; and some heifers.

35th Q. Now, is it not true that aside from the offers made to you, you know nothing about the purchase of feeders except what was told you by other parties and from advertisements?

A. No, I know they were made, but I do not know who they were made by.

36th Q. Do you know to whom they were made?

A. No, sir.

37th Q. Nor what price was paid?

A. I know there was a big demand for that class of cattle all over the State.

38th Q. Do you say there were no purchases of feeders in 1896? A. I do not.

39th Q. Were there any?

A. Not in Montana; that is, I never knew people who wanted cattle of that class of feeders until 1897.

40th Q. In 1898 you say you know there were some sales made? A. I know the demand continued.

41st Q. Do you know of any sales that were made?

A. I know of sales being made.

42d Q. Well, you know nothing only by hearsay?

A. I was not present.

43d Q. Were there any offers made to you in 1898?

A. Yes, sir.

44th Q. For what class of cattle?

A. For that class of cattle.

45th Q. How many offers were made to you?

A. I had one party working with me nearly a month to buy feeders.

46th Q. Did you have any other parties in 1898?

A. Not on the ground.

47th Q. Did he make you any offers for feeders in 1898? A. Yes, sir.

48th Q. What was that offer?

A. Twenty-three and thirty-five per head.

49th Q. Twenty-three and thirty-five?

A. Yes, sir.

50th Q. Twenty-three for yearlings and thirty-five—

A. I wish to correct that twenty-three for yearlings and thirty-three for two year olds.

51st Q. Did you sell any at these prices?

A. No, sir; I did not.

52d Q. Did you sell any beef cattle in Chicago in 1898? A. What class?

53d Q. Beef cattle. A. Yes, sir.

54th Q. How many did you sell? How many that came out of this herd?

A. I cannot tell; I sold all the beef in the herd, but I don't remember how many.

55th Q. Apart from what you received from other cattle out of your own herd, native stock, can you tell what cattle of the N-N brought you?

A. I sold them all in carload lots.

Redirect Examination.

56th Q. Where had the feeders, these men who feed cattle for Chicago, been in the habit of getting supplies of cattle in 1897, if you know, from your own knowledge or from your observation of the market, or your acquaintance with the business?

A. I cannot tell. I know they never bought any in Montana until within the last two or three years.

57th Q. Did the fact that they had come out so far west in 1897 indicate anything to you as to how cattle—from your acquaintance with the market, as to the absence or scarcity as to that class of cattle?

A. It is a known fact that there is a great scarcity of cattle all over Montana and the United States.

58th Q. Would they have come to Montana, and as far west, if it had not been for this scarcity?

(Defendant objects; witness cannot tell whether anybody else would have come so far or not. Sustained.)

A. I don't think they would have come to Montana.

59th Q. You think not?

A. Not if they could have gotten them elsewhere.

60th Q. Now, you were asked by Judge Cullen whether your knowledge as to the purchase of cattle was not from hearsay, or from the offers made you and what you saw in the "Stockgrowers' Journal" of Chicago. I believe you testified in your examination that you had kept track of the market. Now, I want to ask you whether the information which you gave about the demand was obtained in any manner by your general observation of the market for cattle in this country?

A. Yes, sir; it was and the demand people were making in trying to buy here.

61st Q. In your observations what source of information do you seek out to acquaint yourself with the condition of the market, and where do you get your information? Do you utilize offers made to yourself?

A. Certainly.

62d Q. You also utilize what you hear from time to time from other cattle men?

(Defendant objects as leading. Sustained.)

63d Q. I want you to tell all the sources of knowledge that you seek out.

A. Well, so many people were inquiring for cattle and other stock men were holding their cattle higher than heretofore.

64th Q. You learned the reason they were holding them higher?

A. Yes, sir; before 1897 we bought cattle from fourteen to twenty dollars a head and since then we have paid as high as thirty-two dollars for cattle, and I considered that showed quite a rise.

65th Q. The fact of the rise seems to be undisputed, and I want to find out from you what source you went to to find this out?

A. The increased demand for cattle was one.

67th Q. Yes, but where did you learn this?

A. From inquiry to sell or buy.

68th Q. You said you had several opportunities to sell feeders and you did not sell. If you had sold from what source would you have taken the animals?

A. From the stock herd.

69th Q. Would the withdrawal of a large number of a given class from your stock herd have any effect upon the uniform proportion of the herd?

A. It certainly would.

70th Q. Would that have had any effect upon the herd as a stock herd? A. Certainly.

71st Q. Would it increase or decrease its value?

A. Decrease it.

72d Q. Would it be possible to estimate how much the value of the herd as a whole would be decreased?

(Defendant objects; not proper redirect examination. Overruled.)

A. That would depend entirely on what class of cattle were sold out of the herd.

73d Q. Did this feature have anything to do with your refusal to sell feeders from the stock herd?

A. I did not think I was making money enough on them, was the reason I did not sell them.

74th Q. In determining the question as to whether you had gotten your price, would you or would you not have taken into consideration the injury done to the herd as a whole?

A. If I had gotten my price I would have sold them.

75th Q. In determining what your price would be would you have taken into consideration the injury done to your stock herd? A. I certainly would.

Recross-Examination.

76th Q. Mr. McNamara, it was in August and September that you had these offers to buy, was it not—1897?

A. I did not have any offers to buy in September.

77th Q. What month was it? A. It was—

78th Q. You misunderstand me. When was it in 1897 that some one came to you and offered to purchase feeders of you? A. In the summer of that year.

79th Q. What month was it?

A. I don't remember.

80th Q. Did you not say it was in August or September? A. I don't think so.

81st Q. At that time, about, what was the value of the McNamara and Marlow herd as it ran on the range?

A. We had never offered our herd for sale.

82d Q. Do you know what the value was?

A. I don't believe I do.

83d Q. How many feeders parties wanted to purchase of you? A. I had—all I had.

84th Q. How many? A. About two thousand.

85th Q. The reason you did not sell was because you did not get your price? A. Yes, sir.

86th Q. And you would not sell? A. No, sir.

CORNELIUS J. McNAMARA.

Subscribed and sworn to before me this 10th day of February, A. D. 1899.

HENRY N. BLAKE,
Master in Chancery.

Monday Afternoon, Jany. 30, 1899.

FRANK A. FRENCH, a witness called on behalf of the complainants, after being first duly sworn by the master in chancery, testified as follows:

Direct Examination.

(By H. G. McINTIRE, of Counsel for the Complainants.)

Q. 1. State your full name, Mr. French.

A. Frank A. French.

Q. 2. Where do you live now, Mr. French?

A. At Big Sandy.

Q. 3. In the employ of whom?

A. McNamara and Marlow.

Q. 4. Were you in their employ in the fall of 1897?

A. I was.

Q. 5. What was your occupation then—while you were in the employ of Messrs. McNamara and Marlow, in the latter part of the summer or the fall of 1897?

A. I was cooking.

Q. 6. At any particular point in the State, and if so what? A. Yes, sir; at Oswego, Montana.

Q. 7. Were you in that employment in the month of October? A. I was.

Q. 8. And about the 21st, 22d and 23d of that month?

A. Yes, sir.

Q. 9. At the same place? A. Yes, sir.

Q. 10. Are you acquainted with Mr. A. W. Niedringhaus?

A. I am acquainted with a young fellow named Ab. Niedringhaus, if that is him.

Q. 11. Yes, sir; that is the gentleman. Do you remember of any cattle being delivered to McNamara and Marlow by what is called the N. Bar N. outfit, or The Home Land and Cattle Company, in October, 1897?

A. Yes, sir.

Q. 12. About what time of the month?

A. There was some delivered on the 21st and the 22d.

Q. 13. Now, we will return to the 21st, and confine your attention to that. Were you present at any interviews or conversations had between A. W. Niedringhaus and Mr. McNamara, one of the plaintiffs in this action?

A. Yes, sir.

Q. 14. About what time of day did that interview between those two gentlemen occur?

A. It was after dark, I should judge about seven o'clock; somewhere along there.

Q. 15. And where was it that this interview was had?

A. That happened in the cooking tent.

Q. 16. You were cooking at that time?

A. Yes, sir.

Q. 17. Do you remember what that interview was?

A. Yes, sir.

Q. 18. Just state it.

A. Mr. A. W. Niedringhaus came up and demanded a receipt for the cattle that had been delivered.

Q. 19. Delivered when? A. On that day.

Q. 20. Do you know what animals had been delivered that day?

A. I didn't see them counted. I know some were delivered which they shipped to Big Sandy—a train load of stock.

Q. 21. You say he demanded or asked for a receipt?

A. Yes, sir.

Q. 22. What did Mr. McNamara do?

A. He gave him a receipt.

Q. 23. Was anything else said in that talk?

A. No, sir; that was all that was said.

Q. 24. I will ask you whether or not anything was said in that talk with reference to paying for the animals that were delivered that day.

A. No, sir; there was nothing said about paying for the animals one way or the other.

Q. 25. Did you see Mr. McNamara, or either of them, in company with Mr. Niedringhaus?

A. Mr. Niedringhaus stopped there and took supper. That is until some time in the evening.

Q. 26. What did he do when he got through supper?

A. He left the tent and I couldn't say where he went.

Q. 27. Now, when was the next time that you saw these gentlemen together?

A. It was about ten o'clock the next day.

Q. 28. Where did you see them?

A. There in the tent—in the cooking tent.

Q. 29. And what occurred in this second interview?

A. Mr. Niedringhaus came up and asked for a receipt for some cattle that had been delivered that morning.

Q. 30. Asked for this receipt from whom?

A. From Mr. McNamara.

Q. 31. Who else was present in the tent besides Nied ringhaus, McNamara and yourself?

A. Mr. Knoell.

Q. 32. And who else? A. Mr. Marlow.

Q. 33. Now, tell us what occurred at this second interview, what did Mr. Niedringhaus say and what was done?

A. Mr. Niedringhaus demanded a draft for the cattle delivered the day before and also for that day.

Q. 34. Did I understand you a minute ago that he also asked for a receipt? A. Yes, sir.

Q. 35. Was this before or after he demanded the draft?

A. He demanded the receipt and then right away after he got it he demanded a draft.

Q. 36. Did he say anything about what he wanted to do?

A. He said he wanted to put them both in the same envelope and send them away, I don't know where.

Q. 37. And after he asked for this receipt and draft what was said to him?

A. Mr. McNamara said Mr. Marlow would figure it out for him.

Q. 38. And what did Mr. Marlow do?

A. Figured up what was coming to him and handed him a piece of paper—handed Mr. Niedringhaus a piece of paper for inspection.

Q. 39. Did you recognize the method of figuring that Mr. Marlow pursued?

A. He reckoned up what was coming to The Home Land and Cattle Company, what they had delivered and the number of undelivered stock at Oswego and the 500 head of horses.

Q. 40. When you speak of the animals that had been delivered what do you mean?

A. These cattle that had been delivered on the 21st and 22d.

Q. 41. Then, as I understand it, Mr. Marlow figured out the animals delivered on the 21st and 22d of October and the 500 head of horses and the undelivered animals?

A. Yes, sir.

Q. 42. What kind of animals were these undelivered?

A. Stock cattle.

Q. 43. Do you remember, Mr. French, what this figuring amounted to, the total of it?

A. It amounted to something like forty seven hundred dollars?

Q. 44. Forty-seven hundred dollars?

A. Forty-seven thousand dollars.

Q. 45. What else did Mr. Marlow do after he figured up the amount of money that was coming to The Home Land and Cattle Company—did he do any other figuring?

A. He deducted the amount of shortage and handed him the money—the difference.

Q. 46. What was the amount of the shortage that he figured out—do you remember that?

A. They were short about thirty-seven thousand dollars.

Q. 47. That was the shortage. Now, what did he do with this difference between the amount coming to The Home Land and Cattle Company and the shortage claimed—what did Mr. Marlow do then?

A. I do not know as I understand you.

Q. 48. Was the shortage as Mr. Marlow figured it coming from The Home Land and Cattle Company, or was there any difference?

A. Yes, sir; there was a difference coming to The Home Land and Cattle Company.

Q. 49. How much, do you remember?

A. Some $9,675, I think.

Q. 50. Now, with regard to this $9,675, what did Mr. Marlow do?

A. Tendered him the amount in payment.

Q. 51. How did he tender that amount?

A. Mr. Marlow tendered Mr. Niedringhaus the money.

Q. 52. Was it Mr. McNamara or Mr. Marlow that tendered him the money, the $9,675? A. Mr. Marlow.

Q. 53. How do you know that amount was tendered or offered to Mr. Niedringhaus?

A. I saw it tendered.

Q. 54. What kind of money was it offered in?

A. United States currency.

Q. 55. Paper money, wasn't it? A. Yes, sir.

Q. 56. How did you arrive at the fact that it was $9,675 that was tendered, or was it that exact amount that was tendered?

A. Because I counted the money, $9,700—$25 more than the amount that was coming.

Q. 57. Did Mr. Niedringhaus take this money?

A. No, sir.

Q. 58. What did he say when it was offered to him?

A. He said he had no authority to make any settle-

ment but was there to receive and forward the draft to the company.

Q. 59. Was there anything else done by Mr. Niedringhaus?

A. He said he would go down and see Mr. H. L. Niedringhaus.

Q. 60. What was afterwards done by Mr. A. W. Niedringhaus?

A. He went down and brought Mr. H. L. Niedringhaus and Mr. Sharp.

Q. 61. Who was present in the tent with Mr. Niedringhaus besides yourself?

A. These same people, Mr. Marlow and McNamara and Knoell.

Q. 62. What occurred in this second interview with Mr. Sharp and Mr. Niedringhaus? What next came up?

A. He introduced Mr. Sharp and informed them that he was representing the company.

Q. 63. Who did he inform?

A. Mr. McNamara and Mr. Marlow.

Q. 64. What did they say to Mr. Sharp, and what did Mr. Sharp say to those that spoke to him?

A. He demanded a settlement for the stock delivered.

Q. 65. That is, Mr. Sharp did? A. Yes, sir.

Q. 66. Now, what did Mr. McNamara or Mr. Marlow say to Mr. Sharp?

A. Tendered the same amount of money that they had to Mr. Niedringhaus.

Q. 67. What did Mr. Sharp do then?

A. He refused to accept it.

Q. 68. Did he say anything why he made this refusal that you recall?

A. I don't know as I understand you.

Q. 69. You said a minute ago that Mr. McNamara & Mr. Marlow tendered this amount of money also to Mr. Sharp and he refused to accept it. Now, when he refused to accept it did Mr. Sharp say anything and if so what?

A. He demanded payment for the whole of the stock cattle that had been delivered.

Q. 70. Now, do you recall any conversation between those gentlemen at the time he made this demand?

A. Mr. Sharp said he didn't propose—or rather that Mr. Niedringhaus said he didn't propose to pay the shortage.

Q. 71. For what reason—did he give any reason?

A. He didn't give any reason that I remember of.

Q. 72. Did he say he didn't propose to pay it or who didn't propose to pay it?

A. He said that Mr. Niedringhaus didn't propose to pay it.

Q. 73. Which Mr. Niedringhaus—did he mention the name? A. Mr. W. F. Niedringhaus.

Q. 74. What was done after this talk and after this tender? What did the gentlemen do as far as you know, Mr. French?

A. From that on the conversation referred to different subjects and soon after they left the tent.

Q. 75. That is all you know about it?

A. Yes, sir.

Cross-Examination.

(By W. E. CULLEN Sr., Counsel for Defendants.)

Q. 1. Mr. Marlow made up a statement, did he? When Mr. Ab. Niedringhaus came into the tent on the evening of the 21st or the morning of the 22d he made up a statement, did he?

A. I don't know as I catch your meaning.

Q. 2. Did Mr. Marlow make a statement in writing on the morning of the 22d when Mr. Ab. Niedringhaus came to the tent alone?

A. He made up some figures; that is all I know; he figured up the difference.

Q. 3. Figured up the difference?

A. Yes, sir.

Q. 4. What were you doing at this time, Mr. French?

A. I was cooking.

Q. 5. Cooking dinner or something?

A. I was cooking dinner. And I was cleaning up the breakfast dishes.

Q. 6. How long was Mr. Marlow in making up this statement?

A. I couldn't say how many minutes he was; not long.

Q. 7. Half an hour?

A. I shouldn't think he was over that.

Q. 8. About that should you think?

A. I should say about that.

Q. 9. During this time where was Mr. Ab. Niedringhaus? A. Mr. Ab. Niedringhaus was there.

Q. 10. Sitting right there? A. Yes, sir.

Q. 11. Was there any talk going on between Mr. Niedringhaus and Mr. Marlow during this time?

A. Not that I recall—nothing more than common conversation.

Q. 12. Well, was there any common conversation between Niedringhaus and Marlow during this time?

A. I couldn't say as to that to be positive what the conversation was.

Q. 13. Did you hear any conversation between Mr. Marlow and Mr. Niedringhaus during this time?

A. Nothing as I can recall.

Q. 14. Now, after Mr. Marlow had finished making this statement what did he say to anybody?

A. He passed the statement to Mr. Niedringhaus, and told him that was the way he figured it up.

Q. 15. Did you look over the statement to see how he had figured it up? A. I did not.

Q. 16. You don't know, then, what he had figured up except just what you heard there in the conversation?

A. Yes, that is all, sir.

Q. 17. Now, did Mr. Niedringhaus make any reply to this statement that Mr. Marlow made that he had figured it up?

A. He said he had no authority to make a settlement.

Q. 18. Said he had no authority to make a settlement? A. Yes, sir.

Q. 19. Did he take the paper and look at it?

A. Yes, sir.

Q. 20. Did he see it?

A. I don't know; he took it up and looked at it; I suppose he saw it.

Q. 21. Did Mr. Marlow make any reply then as to what Mr. Niedringhaus said?

A. He demanded the delivery of the rest of the cattle and horses.

Q. 22. Mr. Marlow did?

A. Mr. McNamara or Mr. Marlow.

Q. 23. One or the other? A. Yes, sir.

Q. 24. Well, which one was it?

A. I think it was Mr. McNamara.

Q. 25. Well, what did Mr. Marlow say to Mr. Niedringhaus when he told him he had no authority to settle?

A. I don't remember what Mr. Marlow did say.

Q. 26. Well, what did he do, if anything?

A. Mr. Niedringhaus said he would go down and see Mr. H. L. Niedringhaus and bring him up there; and he did so.

Q. 27. Then that concluded the interview between Niedringhaus and Mr. Marlow at that time, did it?

A. At that time, yes, sir.

Q. 28. Now, let me see if I understand what took place there; in the first place, Mr. Niedringhaus came in and demanded a receipt, did he? A. Yes, sir.

Q. 29. And Mr. McNamara sat down and gave him a receipt? A. Yes, sir.

Q. 30. And then he demanded pay for the cattle that were delivered that day and the previous day?

A. Yes, sir.

Q. 31. How much did he demand?

A. I don't know how much the amount was.

Q. 32. Didn't you hear him speak any amount?

A. No, sir.

Q. 33. Did he produce the receipts there?

A. Who produce the receipts?

Q. 34. Ab. produce the receipt he had taken the day before and the receipt Mr. McNamara had just given him? Did he have them in his hand?

A. He had one. I couldn't swear whether he had more or not.

Q. 35. Then he demanded the pay from Mr. McNamara, didn't he—this draft?

A. Well, Mr. McNamara and Mr. Marlow was both sitting on one side of the table and Mr. Niedringhaus on the other; I couldn't say which he demanded it of.

Q. 36. What did he say he wanted to do with it?

A. He said he wanted to put the draft in an envelope and send it with the receipt.

Q. 37. Well, who said anything in response to that, in reply to what he had just said—anyone?

A. Mr. McNamara said Mr. Marlow would figure it up.

Q. 38. And then Mr. Marlow commenced figuring it, did he? A. He did.

Q. 39. Was anything said between Mr. Niedringhaus and Mr. McNamara and Mr. Marlow before he commenced figuring? Anything at all said?

A. Not that I recall.

Q. 40. What did Mr. Marlow use to get these figures from—did he use anything?

A. I don't understand the question.

Q. 41. Where did Mr. Marlow get the figures that he put into the statement—this data?

A. He took the amount of cattle that had been delivered.

Q. 42. Well, what did he have to show the amount of cattle that had been delivered, these receipts?

A. He had some books there by the side of him; I couldn't say what was in them.

Q. 43. You didn't look at them? A. No, sir.

Q. 44. Was Mr. Marlow looking at them when he was making this statement out?

A. I couldn't say as to that.

Q. 45. You say it took him about a half an hour to make out that statement?

A. I said it took him from twenty minutes to a half hour.

Q. 46. What sort of paper was it on?

A. It was on writing paper.

Q. 47. About what size?

A. It was on a sheet of paper about letterhead size—like that there (witness pointing to a letterhead lying on the table.)

Q. 48. It was the size of a letter sheet of paper?

A. Yes, sir.

Q. 49. You don't recall what took place between Mr. Niedringhaus and Mr. McNamara and Marlow unless there might have been some common conversation?

A. That is what I would call it—common conversation. I didn't pay any attention to it at all.

Q. 50. After Mr. Marlow had finished this statement what did he do with it?

A. Passed it to Mr. Niedringhaus across the table.

Q. 51. Right across the table? A. Yes, sir.

Q. 52. Did he say anything when he passed it over?

A. I cannot recall the words. He said that is the way I figure it out how we stand.

Q. 53. And Mr. Niedringhaus took it up did he and looked at it? A. Yes, sir.

Q. 54. And then what did he say?

A. Well, sir, he said he had no authority to make a settlement. All he was to do was to take receipts and deliver them and get drafts for the cattle.

Q. 55. Well, did Mr. McNamara or Mr. Marlow say anything in response to that?

A. They passed him over the paper showing the difference.

Q. 56. What else did they do?

A. Produced the money and tendered it to him for the cattle.

Q. 57. Well, did they say anything about it, telling what the money was for or anything of that sort? Did they say anything that you recall at all, Mr. French?

A. Well, said that made a difference of $9,675 and there is the cash.

Q. 58. What did Mr. Niedringhaus say to that?

A. He said he had no authority to make a settlement.

Q. 59. He had already said that when the paper was passed over to him?

A. Well, at that time he said he would go down and see Mr. H. L. Niedringhaus.

Q. 60. He left the tent did he? A. Yes, sir.

Q. 61. How long was he gone?

A. Probably twelve or fifteen minutes; something like that.

Q. 62. Now, when was it that you counted this money —while he was gone?

A. No, sir; I counted the money as soon as they got over the conversation.

Q. 63. Well, was Mr. Niedringhaus there?

A. No, sir.

Q. 64. Well, it was after he was gone, was it?

A. Yes, sir.

Q. 65. Well, when was it that you counted the money?

A. When they had all left the tent except Mr. McNamara and Mr. Marlow and Knoell.

Q. 66. The second time? A. Yes, sir.

Q. 67. How long did it take you to count the money?

A. Well, I am a pretty poor counter; it took me some time.

Q. 68. What size bills were they?

A. There was one bunch, if I remember correctly, containing fifty dollar bills; the other was a mixed bunch.

Q. 69. Of what denomination?

A. Well, there was one five hundred dollar bill and the rest smaller.

Q. 70. What was the smallest and what was the largest except the five hundred dollar bill??

A. I couldn't say.

Q. 71. Was there any five dollar bills among them?

A. I couldn't say whether there was or not.

Q. 72. Any national bank currency among them?

A. I didn't look to see what they was.

Q. 73. You just looked to see if it was money?

A. Yes, sir.

Q. 74. You didn't look to see if any of it was counterfeit or not? A. No, sir.

Q. 75. Now, Mr. French tell us what occurred after Mr. H. L. Niedringhaus and Mr. Sharp returned?

A. He came back into the tent with Mr. Niedringhaus and Mr. Sharp and said Mr. Sharp is representing the company.

Q. 76. Now, who was in the tent at that time?

A. Mr. McNamara, Mr. Marlow, Mr. Knoell and myself.

Q. 77. How long had Mr. Niedringhaus been gone?

A. Something like twelve or fifteen minutes.

Q. 78. Now, what response, if any, or reply, if any, was made by either Mr. McNamara of Mr. Marlow to this statement that Mr. Sharp was representing the company or was anything said by either of them?

A. They recognized the statement made by Mr. Niedringhaus.

Q. 79. Well, what did they say?

A. They made some proposition to them—

Q. 80. Well, what did either Mr. McNamara or Mr. Marlow say, and which one said it?

A. I don't remember what was said.

Q. 81. Cannot tell what was said? A. No.

Q. 82. Where had this statement—this written statement which Mr. Marlow had made up been in the meantime while Ab. was gone? A. On the table.

Q. 83. Ab. didn't take it with him? A. No, sir.

Q. 84. Either of them?

A. I saw it there while he was gone; I don't think he took it.

Q. 85. Could not have mistaken that for another piece of paper? A. No, sir.

Q. 86. Now, don't you remember that Mr. A. W. Niedringhaus came in and pulled that piece of paper out of his pocket? A. No, sir; I don't.

Q. 87. Well, you remember what Mr. Sharp said when they called their attention to the statement?

A. They said they didn't propose to pay this shortage.

Q. 88. They didn't propose to pay it—that is what they said, is it? A. Yes, sir.

Q. 89. Give any reason for not proposing to pay it?

A. Yes, sir; they said they were going to get the rest of the cattle that fall.

Q. 90. To make up the shortage? A. Yes, sir.

Q. 91. Well, what did Mr. McNamara and Mr. Marlow say about that?

A. They asked him how they were going to do it without any horses or men.

Q. 92. What did he say?

A. I don't remember what he said.

Q. 93. Did he make some reply to it?

A. He said they had plenty of time to round them up, from then till the beginning of November.

Q. 94. Well, what further took place?

A. Mr. McNamara and Mr. Marlow demanded the delivery of the rest of the cattle and horses.

Q. 95. Did they say they would deliver them—did Mr. Sharp say he would deliver them?

A. He said he would deliver them provided they would pay for what had been delivered them and also for the horses and the rest of the cattle.

Q. 96. What was said to them by Mr. McNamara and Mr. Marlow—anything?

A. Nothing except the same proposition as before.

Q. 97. That they would settle according to that statement? A. Yes, sir.

Q. 98. How long did this conversation between Mr. Sharp and Mr. McNamara and Mr. Marlow take—how long a time did it occupy?

A. I should say somewhere about three-quarters of an hour.

Q. 99. And is that all that took place in that three-quarters of an hour that you have narrated? Have you told all that took place in that three-quarters of an hour between those men, Mr. French?

A. Yes, sir; all that I recall.

Q. 100. You were busy all of this time with your duties cooking your lunch and getting it ready, weren't you? A. All the time that was required of me.

Q. 101. Well, it required pretty much all of your time didn't it? A. No, sir.

Q. 102. What part of the time were you unoccupied of this three-quarters of an hour? Weren't you busy all the time that Sharp was in the tent?

A. No, sir.

Q. 103. You were not? A. No, sir.

Q. 104. Do you remember what you were doing while Mr. Sharp was in the tent—were you working about your cooking business?

A. Wasn't doing much cooking because they were right in my way.

Q. 105. Did you have anything on cooking at that time?

A. I believe I had some meat boiling and some vegetables.

Q. 106. And you just stood there and listened to the conversation during the entire three-quarters of an hour, did you?

A. I didn't say that long; somewhere about that long.

Q. 107. And that is all that you recall that occurred between those gentlemen at that time, is it?

A. All I recall.

Q. 108. Any of the parties seem to be anyways angry, any dispute or quarrel, or anything of that kind?

A. No, sir.

Q. 109. Everything seemed to be pleasant?

A. Yes, sir.

Q. 110. Did you hear Mr. Sharp make any demand for

this money for pay for the cattle that had been delivered that day and the day before? A. Yes, sir.

Q. 111. What did he say?

A. He said he wanted the drafts for the cattle that had been delivered.

Q. 112. This was Mr. Sharp that said this?

A. Yes, sir.

Q. 113. What did Messrs. McNamara and Marlow say, if they or either of them said anything to this?

A. They made this proposition.

Q. 114. Did they say they would or would not pay him for the cattle that had been delivered the day before or on that day? Did they say they would pay him for the cattle that was delivered that day and the day before?

A. They said they would if they delivered the horses and the rest of the cattle.

Q. 115. Just according to that statement?

A. Yes sir.

Q. 116. Now, independent of the statement had they refused to pay him for the cattle that was delivered that day and the day before? A. I couldn't say.

Q. 117. Don't you recall that they emphatically did say so? A. I don't recall.

Q. 118. You don't recall it? A. No, sir.

Q. 119. Now, in order to refresh your recollection, don't you recollect that they did refuse to do it and Mr. Sharp said they had broken their contract, or something to that effect? A. I don't remember.

Q. 120. Do you remember anything that was said about a breach of the contract in your presence there that day by either side? A. No, sir; I do not.

Q. 121. You didn't hear anything of that kind said?

A. No, sir; I didn't hear anything said about a breach of the contract.

Q. 122. Now, the night before Mr. Ab. Niedringhaus took supper in your tent, did he? A. Yes, sir.

Q. 123. Where was Mr. Sharp and Mr. H. L. Niedringhaus?

A. I don't know anything about that; they didn't come near the tent.

Q. 124. When did you first see those two gentlemen there, Mr. French? A. Which gentlemen?

Q. 125. Mr. Sharp and Mr. H. L. Niedringhaus?

A. I don't know what time I saw Mr. H. L. Niedringhaus; it was some time during the summer.

Q. 126. Well, but on this occasion had you seen them before Mr. Ab. Niedringhaus brought them up to the tent? A. No, sir; I had not.

Q. 127. How long before supper was ready that Mr. Ab. Niedringhaus had got this receipt for the cattle that was delivered that day?

A. Supper was all ready but the men were not ready to eat it. As quick as they were ready they got supper after the receipt.

Q. 128. Do you remember what he said to Mr. McNamara when he asked for the receipt?

A. He simply said he would take a receipt for the cattle.

Q. 129. Didn't he say, "I will not ask you for a draft to-day, but I want a receipt for the cattle that have been delivered"?

A. There was nothing said that I heard about a draft at all; he just simply asked for a receipt.

Q. 130. Nothing said about a draft that you heard?

A. No, sir.

Q. 131. Well, had you heard all that passed between these men about it? A. Yes, sir.

Q. 132. The whole conversation took place inside the tent? A. Yes, sir.

Q. 133. Had Mr. McNamara and Mr. Niedringhaus come there together to the tent? A. I think not.

Q. 134. You think Mr. McNamara came first, do you?

A. Yes, sir.

Q. 135. How long had he been there before Mr. Niedringhaus put in an appearance?

A. Oh, a short time; but a very few minutes.

Q. 136. They had been out where these cattle were being delivered up at the cattle yards, hadn't they—up at the stockyards?

A. I suppose they had; I wasn't up there.

Q. 137. And you think Mr. A. W. Niedringhaus came to the tent a few minutes afterwards?

A. Yes, sir.

Q. 138. Well, when Ab. came in what was the first thing he said? A. I don't recall what he did say.

Q. 139. You don't, Mr. French, pretend to recall any conversation except in a general way that was had there on these occasions, do you—you don't pretend to repeat the language that every party used, do you?

A. I don't understand what you mean.

Q. 140. Well, I have repeatedly asked you what Mr. McNamara said and what Mr. Niedringhaus said, and in each case you don't seem to be able to do it; you state generally what you understood to be the purport of the conversation between them, but not the language used; is that not true?

A. I don't recall the exact words of any talk they used there.

Q. 141. No, that is what I though. When he asked for a receipt did Mr. McNamara make any reply to him at all, or did he just turn around and write out the receipt?

A. He says, "All right," and went on and wrote the receipt.

Q. 142. Nothing said between them in your presence about the number of cattle the kind or anything of that sort? A. No, sir.

Q. 143. Well, that is all that took place there except with Mr. Ab. at supper?

A. Well, during supper they spoke about the train pulling out for Chicago.

Q. 144. Had the train pulled out for Chicago?

A. It did while they were eating supper, and they said there the train has gone to Chicago.

Q. 145. Well, how did it happen that Mr. Niedringhaus took supper there?

A. I don't know; he often took supper there.

Q. 146. Anybody invite him to do it?

A. I think he was invited there.

Q. 147. Where did he board?

A. Lived at the ranch—the N-N ranch.

Q. 148. After supper did he return to the ranch that night? A. I don't know, sir.

Q. 149. Where did he go to?

A. He said he stopped at Jack Caldwell's.

Q. 150. The storekeeper at Oswego?

A. Yes, sir.

Redirect Examination.

Q. 1. When you gave these estimates of time to Mr. Cullen, a half hour in one instance and three-quarters of an hour in another to a question of his, you don't pretend to say accurately, do you? A. No, sir.

Q. 2. You didn't look at your watch, did you?

A. No, sir.

Q. 3. It is just a guess? A. That is all.

FRANK A. FRENCH.

Subscribed and sworn to before me this 31st day of January, 1899.

HENRY N. BLAKE,
Master in Chancery.

HERMAN KNOELL, a witness called on behalf of the complainants, after being first duly sworn by the master, testified as follows, to wit:

Direct Examination.

(By Mr. H. G. McINTIRE, of Counsel for the Complainants.)

Q. 1. What is your business, Mr. Knoell?

A. Cattle business; cow-punching, as they call it.

Q. 2. How long have you been in the cattle and cow-punching business?

A. Oh, about sixteen or seventeen years.

Q. 3. At present who are you working for?

A. McNamara and Marlow.

Q. 4. Where were you working, and for whom were you working in the year 1897?

A. Mr. McNamara and Mr. Marlow.

Q. 5. At what particular place in the State?

A. At Oswego, in Montana.

Q. 6. Do you know anything about the delivery of cattle by what is called The Home Land and Cattle Company, or the N. Bar N. Cattle Company to McNamara and Marlow? A. Yes, sir; I do.

Q. 7. Do you know anything about deliveries made by that company to McNamara and Marlow in October, 1897? A. Yes, sir.

Q. 8. What time were such deliveries made?

A. I remember October 21st and 22d.

Q. 9. Do you remember what kind of animals and what number were delivered on the 21st day of October?

A. Yes, sir.

Q. 10. Please tell us.

A. 626 head of steers delivered there.

Q. 11. And you say there was another delivery on the 22d? A. The 22d, yes, sir.

Q. 12. What was the number of that delivery?

A. 307 head.

Q. 13. About what time of the day on the 22d was

this number of cattle delivered—this 307 head, Mr. Knoell? A. Delivered in the morning.

Q. 14. Do you know when the delivery was completed? That is, how long it took to deliver them—what time it was?

A. Oh, it was about eight or nine o'clock when it was over.

Q. 15. This 307 head, in what way were they delivered? How were they turned over?

A. They were cut out and counted to McNamara and Marlow.

Q. 16. And what did McNamara and Marlow do with the 307 head?

A. Received them, and sent them to the agency.

Q. 17. What agency? A. Poplar.

Q. 18. Poplar Agency? Were any further deliveries of cattle made on October 22d after the receipt of this 307 head? A. No.

Q. 19. After the 307 head were delivered, what did you people do, where did you go?

A. After they were delivered, we all went to our tent and stayed in there.

Q. 20. You know A. W. Niedringhaus—was he there?

A. No, he wasn't there.

Q. 21. When did he come in?

A. He came in very shortly after we got in there.

Q. 22. Do you know what time of the day he came in there?

A. Nine o'clock; between nine and ten o'clock; something like that, I should say.

Q. 23. Who came in with him?

A. He came in alone.

Q. 24. When he came into the tent, who was present in the tent?

A. Mr. McNamara and myself and Mr. French.

Q. 25. Anybody else?

A. No, sir. Yes, sir; Mr. Marlow was in there too.

Q. 26. Anybody else? A. No, sir; nobody else.

Q. 27. You four were there, and then Mr. Niedringhaus came in; now, do you know what occurred when Mr. Niedringhaus came into the tent?

A. Yes, sir; a receipt for the cattle was turned over that morning.

Q. 28. 307 head?

A. Yes, sir; 307 head.

Q. 29. Did you hear who he asked the receipt of?

A. Yes, sir; Mr. McNamara.

Q. 30. What did Mr. McNamara do when he asked for the receipt?

A. Mr. McNamara wrote out a receipt and handed it to him.

Q. 31. Was anything said to Mr. Niedringhaus after he got the receipt, if you know?

A. He asked for drafts for the cattle that were delivered that day, and the day before also.

Q. 32. Whom did he ask this of?

A. He asked Mr. McNamara.

Q. 33. And what did Mr. McNamara do—or did he say what he wanted to do with this draft?

A. Yes, sir; he told them he wanted to send them off.

Q. 34. You say "them"; what did he mean by "them"? Did he ask for two drafts or one?

A. He said he wanted to send them off for the cattle.

Q. 35. What papers did he want to send off?

A. Wanted to send off drafts for the cattle.

Q. 36. What did Mr. McNamara say to him, when he asked for drafts for the cattle?

A. He told him Mr. Marlow would figure it out, and settle with him.

Q. 37. Turned him over to Mr. Marlow did he?

A. Yes, sir.

Q. 38. Now, after Mr. Niedringhaus was turned over to Mr. Marlow, what did Mr. Marlow do?

A. Mr. Marlow figured up the cattle that was delivered on the 21st and 22d, and also what they were holding 457 head, and 500 head of horses. He figured it up.

Q. 39. Did he figure up anything else?

A. He figured up the strays.

Q. 40. Do you remember approximately what this amount figured up to Mr. Knoell? A. Yes, sir.

Q. 41. Well, tell us what it was. A. $47,575.00.

Q. 42. What else did Mr. Marlow figure up, if you know? A. He also figured up the shortage.

Q. 43. Mr. Marlow claimed a shortage then, did he?

A. Yes, sir.

Q. 44. Do you remember how much of a shortage Mr. Marlow figured up in this statement?

A. Not exactly, I don't; something like 1,900 head of cattle.

Q. 45. And what did Mr. Marlow then offer to do to Mr. Niedringhaus?

A. There was a difference of $9,765.00 which he hadn't paid Mr. Niedringhaus, after everything was figured up.

Q. 46. He offered to pay Mr. Niedringhaus the difference, did he? A. Yes, sir.

Q. 47. You saw him make this offer?

A. Yes, sir.

Q. 48. How did he make the offer?

A. Offered it to him in money.

Q. 49. Count out the money to Mr. Niedringhaus?

A. It was all in a bundle there.

Q. 50. Handed it over to him? A. Yes, sir.

Q. 51. Did Mr. Niedringhaus take it?

A. No, sir.

Q. 52. Did he give any reason for not taking such an enormous sum of money?

A. He said he couldn't settle with him that way; he didn't have no authority to.

Q. 53. He wouldn't take the $9,675.00?

A. No, sir.

Q. 54. Well, did he say anything else about what he would do, or anything of that kind?

A. He said he would have to get Mr. H. L. Niedringhaus.

Q. 55. After he said this, what did Mr. A. W. Niedringhaus do?

A. He went down after Mr. H. L. Niedringhaus and brought him and Mr. Sharp up there.

Q. 56. Were you in the tent when they came up there?

A. Yes, sir.

Q. 57. What was said when Mr. Sharp was brought into the tent?

A. Mr. Niedringhaus introduced Mr. Sharp to them, and said he would take care of the business for them.

Q. 58. What did Mr. Sharp do?

A. He demanded payment for the cattle that had been received that day and the day before.

Q. 59. What did Mr. McNamara and Mr. Marlow say?

A. Offered them the sum of money—the same money that they had offered to Mr. Niedringhaus before.

Q. 60. What did Mr. Sharp say to that?

A. He said he couldn't take it; wouldn't accept it.

Q. 61. Did he give any reasons why he wouldn't accept it?

A. He said that Mr. W. F. Niedringhaus refused to pay for any shortage, and couldn't settle.

Q. 62. Mr. Sharp said that Mr. W. F. Niedringhaus wouldn't pay any shortage? A. Yes, sir.

Q. 63. That is what Mr. Sharp said?

A. Yes, sir.

Q. 64. Was anything else said?

A. Mr. McNamara offered to bet him a suit of clothes that Mr. W. F. Niedringhaus didn't say that.

Q. 65. In other words, Mr. McNamara bluffed Mr. Sharp with a suit of clothes? A. Yes, sir.

Q. 66. Did Mr. Sharp call the bet? A. No, sir.

Q. 67. Then what else occurred—what did Mr. Sharp say after that?

A. Well, they were talking about one thing and another, just every-day matters. Just a conversation of different kinds.

Q. 68. Mr. Sharp also refused this money?

A. Yes, sir.

Q. 69. Was it offered to him? A. Yes, sir.

Q. 70. It was offered to him also? A. Yes, sir.

Q 71. The same sum of money that had been offered to Mr. Niedringhaus was offered to Mr. Sharp?

A. Yes, sir.

Q. 72. And he refused it also? A. Yes, sir.

Q. 73. Now, after this refusal, was anything said to those gentlemen by Mr. McNamara or Marlow, or either of them, as to the delivery of the animals still on hand?

A. Yes, sir; they demanded the balance of the cattle that were being held, and also the saddle horses.

Q. 74. And what did these gentlemen say to them?

A. They said they would bring them in and turn them over, provided they would give them a draft as they turned them over.

Q. 75. Did they say they would turn these animals over, if they were paid for, or did they insist on having them all paid for?

A. They insisted on them paying for everything.

Q. 76. Before they would turn over the 457 head, and the 500 head of horses? A. Yes, sir.

Q. 77. Well, after they got through with this little controversy or talk, what did Sharp and A. W. Niedringhaus and H. L. Niedringhaus do?

A. They didn't do anything, stayed around there for a while, and then kind of drifted off and scattered around in different places.

Q. 78. Was anything said about the 457 head of cattle that was still remaining undelivered on the outside?

A. They remained outside, and the saddle horses were all put into the yard.

Q. 79. What was done with the saddle horses after they were put into the yard, as to ascertaining what number was there?

A. Well, they counted them out; counted out 500 head.

Q. 80. Who counted them?

A. Mr. McNamara and Mr. Marlow and I.

Q. 81. Are you the only people that did the counting?

A. Blackmon of the other side also counted.

Q. 82. Well, why was this counting done?

A. Well, they were to have five hundred head of horses.

Q. 83. And were there enough horses to make up 500 head?

A. There was to be seven hundred head of them, and they were to take out 500 head of them.

Q. 84. How many horses did they have to take the 500 head from? A. About six hundred head.

Q. 85. They left a surplus then, did they, after they had got their 500 head out? A. Yes, sir.

Q. 86. What was done with them?

A. Put in a different pen.

Q. 87. What kind of animals were they in this different pen? A. Old, broken-down cow horses.

Q. 88. In order to get these 500 head and some odd, what did the boys have to do with these horses?

A. Turned in everything they had; the boys that were working unsaddled their horses and turned them into the pen.

Q. 89. Now, after the cattle and these horses were counted, was there another interview between Sharp and Marlow, and McNamara and A. W. Niedringhaus, or any of them? A. Yes, sir; there was.

Q. 90. Tell us what that interview was?

A. Well, they wanted pay for the horses right there; and then Mr. McNamara and Marlow told them if they would bring the cattle in, they would settle for the whole business.

Q. 91. What did McNamara and Marlow do then with reference to paying for any of the animals?

A. They offered them the same money that they had before.

Q. 92. Tendered the money again, did they?

A. Yes, sir.

Q. 93. Did they request these gentlemen, Sharp and Niedringhaus, to go ahead with the contract at that time? A. Yes, sir; they did.

Q. 94. What did Sharp or Niedringhaus say in that regard?

A. Said they wouldn't turn anything over unless they gave a draft for what was turned over.

Q. 95. In other words, they wanted a draft before they turned over the animals?

A. Looked that way.

Q. 96. Who was the foreman or ranch boss of the defendant cattle company, Mr. Knoell?

A. Loss Blackman.

Q. 97. You know Loss Blackman, do you?

A. Yes, sir.

Q. 98. Had you had any talks or conversations with Mr. Blackman prior to this delivery on October 21st, with reference to the delivery? A. Yes, sir.

Q. 99. What did he say with reference to that delivery?

A. He said that they were ready to make a final delivery of the cattle on the 21st.

Q. 100. How long before the 21st was it?

A. Something like four or five days.

Q. 101. Said what there would be in that delivery?

A. Yes, sir; horses and everything.

Q. 102. Do you know what the defendant company had done with its various outfits that it had on on these round-ups, or subsequent to that time?

A. Which?

Q. 103. This talk was about the three or four days before the 21st of October, was it? A. Yes, sir.

Q. 104. This talk with Blackman?

A. Yes, sir.

Q. 105. Now, were there any indications around there pointing to the fact that they had finished their round-up that year? A. Yes, sir.

Q. 106. What were they?

A. They had pulled in two or three wagons, and there was a wagon there holding the cattle on the north side at Oswego. They had turned the cattle over to them.

Q. 107. This wagon on the north side was still out?

A. Yes, sir.

Q. 108. They had brought in their other wagons, had they?

A. Yes, sir; they had paid off the men and let them out, and turned the saddle horses into the pasture and stowed the wagons away.

Q. 109. Is it customary in the cattle business, if you are still going on the round-up, to turn your horses into the pasture? A. No, sir.

Q. 110. Why not?

A. Because that shows that they are through work.

Q. 111. How does that show that the men are through work, from a cattleman's standpoint?

A. Well, they had pulled the wagons off and paid the men off, and the men had left there. They had turned the saddle horses into the pasture. They wouldn't turn them out if they had to make another round-up.

Q. 112. In other words, in the conduct of the cattle business each wagon that goes out on the range on a round-up has a number of horses to itself?

A. Yes, sir.

Q. 113. And it takes a good many horses, doesn't it?

A. Yes, sir.

Q. 114. What is the usual number of men and horses usually taken along with one wagon?

A. Ten, twelve or fifteen men with a wagon, and 110, 120 or 150 head of horses.

Q. 115. You are acquainted with the neighborhood of Oswego and where this N. Bar N. range is, aren't you, Mr. Knoell? A. Yes, sir.

Q. 116. Is it customary to have round-ups on that range there after October 21st?

A. No. As a general rule, everybody is through by that time. It is pretty late in the season.

Q. 117. In this year of 1897, who had been working that range there, outside of the defendant cattle company?

A. The Circle Diamond and the Sieben outfit.

Q. 118. What had become of these two outfits?

A. They had all quit work; were through for the season.

Q. 119. In working a range, it is customary for several outfits to work together, isn't it?

A. Yes, sir.

Q. 120. Do you know how many wagons The Home Land and Cattle Company had on the round-up of 1897?

A. Yes, sir; they had six.

Q. 121. And on or about October 21st, 1897, do you know how many had been brought in?

A. They had all been brought in then.

Q. 122. There was one outfit on the north side of the river, wasn't there, Mr. Knoell?

A. They were still holding those cattle closely.

Q. 123. Yes, but all the wagons with the exception of Caldwell's had been brought in?

A. Yes, sir; laid off—through.

Q. 124. And the Caldwell outfit were doing what?

A. Holding these cattle to turn over.

Q. 125. You wouldn't call that a round-up outfit?

A. No, sir; they was through rounding-up.

Cross-Examination.

(By Mr. W. E. CULLEN, of Counsel for the Defendant.)

Q. 1. How long prior to the 21st day of October, 1897, had you been down to the N. Bar N. ranch, Mr. Knoell?

A. Not a great many days before that. Something like six or seven days.

Q. 2. The wagons were not in at that time?

A. Some of them.

Q. 3. How many were in?

A. I think there was three or four wagons got in. Three or four wagons.

Q. 4. They had been in and gone out again?

A. No, sir; the wagons with all the men were paid off, and the men had left the country.

Q. 5. Horses in the pasture? A. Yes, sir.

Q. 6. Mr. Caldwell, you say was holding the cattle?

A. Yes, sir.

Q. 7. He was there holding the cattle or something?

A. The biggest part of the summer he was rounding up.

Q. 8. He did round-up some then, did he?

A. Yes, sir.

Q. 9. What country did he work?

A. He worked the north side of the river up towards the line.

Q. 10. Who assisted him?

A. Well, he had a number of men.

Q. 11. Well, wasn't there any other outfit there besides Caldwell's outfit?

A. Yes, sir; there was another outfit there that took cattle from Caldwell as he was rounding them up.

Q. 12. Who was that? A. Len Morrow.

Q. 13. Well, what other outfits were there on that round-up on the north side of the river?

A. The Circle Diamond and Sieben's outfit.

Q. 14. That was on the north side? A. Yes, sir.

Q. 15. How about the south side?

A. I didn't know anything about on the south side.

Q. 16. Just only on the north side? That you knew nothing about, did you? A. Yes, sir.

Q. 17. McNamara and Marlow have any cattle in there? A. No, sir.

Q. 18. On the morning of the 22d, what time was it when you started to work, Mr. Knoell?

A. Started to work pretty early.

Q. 19. Well, how early did you get up that morning?

A. Up at five o'clock in the morning; generally had breakfast about five o'clock in the morning.

Q. 20. You had your breakfast about five o'clock?

A. Yes, sir.

Q. 21. How long did you wait there before you started out? A. Not very long.

Q. 22. Who went out to the herd that morning besides yourself?

A. Who went with me to the herd that morning?

Q. 23. The morning of the 22d of October, yes, sir.

A. Mr. McNamara.

Q. 24. Was he the only man?

A. There was Mr. Bob Dye.

Q. 25. Who was he?

A. He was a man working for Mr. McNamara and Marlow.

Q. 26. You three, then, went together?

A. Yes, sir; Mr. Marlow came out there too.

Q. 27. Well, was A. W. Niedringhaus and the N. Bar N. people—where were they, around there some place, do you think?

A. They all come up to the herd after a bit.

Q. 28. You got there before they did.

A. I wouldn't say for certain; they were there a short time after we were, or they might have been there first for all I know about it.

Q. 29. You don't state that positively?

A. No, sir.

Q. 30. Well, now, didn't you wait a while for them there at Oswego before starting out?

A. Not that I know of.

Q. 31. Where was Mr. Blackman?

A. Blackman was around there somewheres.

Q. 32. Where did you first see Blackman that morning? A. Saw him at the herd first.

Q. 33. You didn't ride out there with Loss, did you?

A. No, sir.

Q. 34. How far from Oswego was it to where the herd was?

A. About two miles, I should judge; mile and a half or two miles.

Q. 35. The herd had been moved down then, had it, the day before?

A. They were holding them in the vicinity there for some time before that.

Q. 36. That is where they had been holding them for some time?

A. Right around there; not quite close.

Q. 37. I thought they had been holding them there within four or five miles of Oswego?

A. Well, they were tallying them and turning them over at that time, and they had moved them down closer.

Q. 38. Now, these were all steers, this 307 head, were they?

A. No, sir; there was cows among them.

Q. 39. How many steers were there?

A. I don't know; I don't remember.

Q. 40. Anything else except steers and dry cows?

A. No, sir.

Q. 41. Were these animals cut out when you got there? A. Were they—

Q. 42. Were they cut out when you got to the herd that morning? A. No, sir; I think not.

Q. 43. Who cut them out?

A. They cut them out, and we helped

Q. 44. After they were cut out they were counted were they? A. Yes, sir.

Q. 45. By whom?

A. By both them and Mr. McNamara and Mr. Marlow.

Q. 46. Any dispute about the number of cattle?

A. None that I heard.

Q. 47. Were they driven between two men, or anything of that sort, Mr. Knoell? A. Yes, sir.

Q. 48. And who did the counting?

A. Mr. McNamara and Mr. Loss Blackman.

Q. 49. What were you doing while they were doing this counting? A. Sometimes I might count.

Q. 50. Do you know whether you counted or not?

A. Yes, sir; I do know.

Q. 51. How many did you count?

A. I counted that number?

Q. 52. Then you counted all the cattle yourself, did you? A. Yes, sir; I did.

Q. 53. Mr. McNamara counted them too?

A. Yes, sir.

Q. 54. Mr. Loss Blackman counted them also?

A. Yes, sir.

Q. 55. Now, who else besides Mr. Loss Blackman was there representing the Lazy N. people?

A. Mr. Ab. Niedringhaus.

Q. 56. Ab. was there, was he? A. Yes, sir.

Q. 57. Did he do any counting, if you know?

A. I don't know, I didn't ask him.

Q. 58. Well, couldn't you see?

A. Well, I couldn't say; he might be counting, for all I knew; a man might stand and count, and you wouldn't know whether he was counting or not.

Q. 59. Well, how do you know that Loss Blackman was counting?

A. Because I heard Mr. McNamara say he was going to count.

Q. 60. Well, didn't you say you were going to count?

A. No, sir.

Q. 61. But you counted just the same?

A. Yes, sir.

Q. 62. But Mr. McNamara and Mr. Blackman were the responsible parties, were they?

A. They were the responsible parties, yes, sir.

Q. 63. If you and Ab. counted, it wasn't official—wouldn't go?

A. Oh, I don't know; it might. I wasn't there for that purpose, I wasn't.

Q. 64. How long did it take to get these cattle cut out now, and counted?

A. Probably an hour and a half or two hours. Somewheres along there; I don't know that exactly.

Q. 65. And then they were started at once to the Poplar River Agency, were they?

A. Yes, sir; they were.

Q. 66. Did you go with them a short distance?

A. Just a little ways; just opposite to the camp.

Q. 67. You were Mr. McNamara and Marlow's foreman at that time, weren't you, Mr. Knoell?

A. Yes, sir; I was supposed to be.

Q. 68. And you went a short distance, a mile or two, with them, didn't you, Mr. Knoell?

A. Probably a mile to our camp; the cattle were west of the camp; and I followed with them to our camp.

Q. 69. The cattle were going east?

A. Yes, sir.

Q. 70. They drove them from Oswego?

A. Yes, sir; right by there.

Q. 71. And you followed them down as far as the camp and stopped there, did you? A. Yes, sir.

Q. 72. Now, who came along down with you?

A. We were all right along with the cattle.

Q. 73. McNamara and Marlow too?

A. McNamara and Marlow too, yes, sir, and so was Blackman.

Q. 74. Anybody else there?

A. There was a lot of boys there; might have been four or five men there; there was some men working for that outfit.

Q. 75. Now, Mr. McNamara and Marlow had hired some men to go down to Poplar with these cattle, hadn't they?

A. They had men down there all the time.

Q. 76. These were men that you had hired, or men that you had with you all the time that went with them?

A. Yes, sir.

Q. 77. Who was in charge there?

A. A fellow by the name of Bob Dye.

Q. 78. Bob Dye took charge of the cattle and took them to the agency, did he? A. Yes, sir.

Q. 79. Well, you were horseback of course?

A. Yes, sir.

Q. 80. After you came back what did you do with the horses?

A. Rode up to the camp and stopped there.

Q. 81. Tie your horse?

A. No, sir; let him stand; they will stand anywhere.

Q. 82. Didn't unsaddle him? A. No, sir.

Q. 83. And during the time that this interview took place, your horse was standing there outside the tent?

A. What interview?

Q. 84. With Ab. Niedringhaus, that you have been testifying to? A. I don't remember that.

Q. 85. How long had your horse been standing there outside the tent, Mr. Knoell?

A. Stood there until I got ready to use him.

Q. 86. How long before you got ready to use him?

A. I don't know; might have been two hours.

Q. 87. You went into the tent though, did you?

A. Yes, sir.

Q. 88. Who was there?

A. Mr. McNamara, Mr. Marlow and Mr. French.

Q. 89. Anybody else? A. No, sir.

Q. 90. How long was it before anybody else came in?

A. We wasn't there but a short time; it seems like Mr. A. W. Niedringhaus came in.

Q. 91. Well, he had been right there with you up to this time? A. No, sir.

Q. 92. Rode up with you, and helped to drive the cattle? A. No, sir.

Q. 93. Where did he go?

A. No, he had left us some place, but I don't know where he did go to.

Q. 94. Left when the cattle started?

A. No, sir; he was there when we started to come down to the camp.

Q. 95. Anybody there representing the N. Bar N. people when the cattle left, except Blackman?

A. Yes, sir.

Q. 96. Then you left, leaving Bob Dye and those he had with him to drive the cattle down?

A. Yes, sir.

Q. 97. Well, when Mr. Niedringhaus came in, what did he say?

A. He asked for a receipt for those 307 head of cattle that was turned over to Mr. McNamara and Mr. Marlow. Mr. McNamara sat down and gave it to him.

Q. 98. Then what did he say?

A. He asked for a draft for the cattle that was turned over the day before and that day.

Q. 99. What did Mr. McNamara say to that?

A. Mr. McNamara said, "Mr. Marlow will settle with you."

Q. 100. Well, did Mr. Marlow do it?

A. Yes, sir; he did.

Q. 101. Well, was the settlement entirely satisfactory to Mr. Niedringhaus? A. No, I don't think it was.

Q. 102. Well, then, if it was settled with Mr. Niedringhaus, how did he happen to go afterwards and call in Mr. Sharp and Mr. H. L. Niedringhaus?

A. Well, Mr. Niedringhaus wouldn't settle; said he didn't have any authority to settle.

Q. 103. Did he say anything else about it?

A. Said he would have to go down and see Mr. H. L. Niedringhaus.

Q. 104. Now, you have stated what Mr. Marlow figured up there; did you see the statement that he had made out? A. No, sir; I did not.

Q. 105. Didn't see it? A. No, sir.

Q. 106. Well, how do you recollect what that statement contained then, if you didn't see it?

A. I could hear them talk; after they explained to Mr. Niedringhaus what it was.

Q. 107. Well, you have talked this over with Mr. Marlow and Mr. McNamara several times since that?

A. No, sir.

Q. 108. How often have you talked it over?

A. Not at all.

Q. 109. Well, have you talked it over with anybody else?

A. Well, might have in conversation with the boys, or something like that.

Q. 110. You had to Mr. French?

A. No, sir; not at all.

Q. 111. Now, there was $47,575.00 coming to the N. Bar N. people was there, according to that statement figured up by Mr. Marlow?

A. I guess there was; taking the shortage out, there wasn't that much.

Q. 112. Did you make a minute memorandum of the amount at that time?

A. Yes, I guess I did; I remembered it, anyway.

Q. 113. Well, did you make any memorandum of it anywhere in writing? A. No, sir.

Q. 114. And you remember that that was the amount, do you, exactly? A. Yes, sir.

Q. 115. And you haven't talked it over with anybody since then? A. Not that I remember of.

Q. 116. Well, is there any reason why you would remember the amount any more than any other thing that took place there?

A. I don't know that there is any reason that I know of.

Q. 117. Now, the shortage was also figured up, wasn't it? A. Yes, sir.

Q. 118. How much did that amount to?

A. There was something like 1900 head.

Q. 119. No, but in dollars; how much did that amount to? A. Something like $37,000.00.

Q. 120. Was that exactly the sum? A. No, sir.

Q. 121. Well, then, how do you remember one sum more than another—you heard both sums mentioned there?

A. I couldn't say. Don't you remember one thing more than others at times?

Q. 122. Now, you heard the sum that Mr. Marlow figured up there as the shortage, didn't you, Mr. Knoell?

A. Yes, sir.

Q. 123. And you don't remember it, do you?

A. Remember what?

Q. 124. Remember what that sum was exactly, do you? A. Not to a dollar, no, sir.

Q. 125. Now, you also heard the sum that he figured up as being the amount due for the cattle that had been delivered October 21st and 22d, the cattle that were being held and the five hundred head of horses?

A. Yes, sir.

Q. 126. That was $47,675.00, wasn't it?

A. No.

Q. 127. And was it—how much was it?

A. $47,575 with the strays.

Q. 128. Was Mr. Marlow figuring in the strays?

A. Yes, sir; he was.

Q. 129. How many strays did he figure in?

A. 113 head of strays.

Q. 130. That was the number he figured in?

A. Yes, sir.

Q. 131. Were any of those steers or spayed heifers?

A. I really don't know; didn't notice that.

Q. 132. But the strays you remember, amounted to 113 head? A. Yes, sir.

Q. 133. Did you get any more strays after that?

A. I didn't see any more.

Q. 134. Learn of any more? A. I did not.

Q. 135. Did you make a memorandum anywhere of the strays? A. No, sir.

Q. 136. Now, how are you able to testify to the exact number of strays, and you are not able to testify as to the number of cattle that were claimed by Mr. McNa-

mara and Mr. Marlow to be short on this settlement that they were having?

A. Because I heard them talking about it, and figuring it out—Mr. Niedringhaus and Mr. Marlow.

Q. 137. Well, didn't you hear them talking about the shortage and figuring it up?

A. I heard them talk about the shortage.

Q. 138. And figure it up?

A. Well, I didn't see them figure it up; I heard them talking about it.

Q. 139. Was there any dispute as to the number that was short? A. Not that I know of.

Q. 140. Well, what was the number stated to be that they were short, Mr. Knoell? A. I don't know.

Q. 141. Well, was anything further said at this time between Mr. McNamara and Marlow and Mr. Niedringhaus—Mr. A. W. Niedringhaus, in your presence?

A. Nothing that I remember.

Q. 142. Nothing that you remember?

A. Not that I know of; I don't just exactly understand your question.

Q. 143. Well, Mr. A. W. Niedringhaus left the tent, did he say anything about where he was going, or what he was going to do?

A. When he left the tent what time?

Q. 144. Well, we are talking about after you got back from getting these cattle started for Poplar, when Mr. Ab. came in after you got there some time, and demanded a receipt of Mr. McNamara, and he gave it to him?

A. After he left that time and said he was going to see Mr. H. L. Niedringhaus.

Q. 145. Then you do remember something further that was said between them? A. I expect I do.

Q. 146. Well, did Mr. McNamara and Mr. Marlow say anything in reply to that?

A. No, I don't think they did.

Q. 147. Just said that and left the tent?

A. Yes, sir; and went for Mr. H. L. Niedringhaus.

Q. 148. Well, while he was gone, what did Mr. McNamara and Mr. Marlow do?

A. Just sat there in the tent, and waited for them to come back.

Q. 149. Talk about anything while they were gone?

A. Nothing of any importance.

Q. 150. Do you remember anything that was said while they were gone, Mr. Knoell?

A. No, sir; I do not.

Q. 151. Was anything said?

A. Not that I know of.

Q. 152. They set there one on each side of the table?

A. Not that I remember of.

Q. 153. Where were they?

A. On the inside of the tent.

Q. 154. Were you in or out?

A. Might have been both in and out.

Q. 155. How long was he gone, if you remember?

A. Might have been gone ten or fifteen minutes.

Q. 156. When he came back who was with him?

A. Mr. Niedringhaus and Mr. Sharp.

Q. 157. When he came back, what was the next thing that was done? A. They introduced him to them.

Q. 158. Did they introduce him to you?

A. No, sir.

Q. 159. Or to Mr. French? A. No, sir.

Q. 160. Now, what did they say?

A. He said he was there representing his company, and they would have to settle with him, and they offered him the same figures and the same money that they had Mr. Niedringhaus.

Q. 151. Now, what did they say about it when Mr. Niedringhaus—or rather Mr. Sharp told them, he was there representing the company; what did he say?

A. He demanded a draft for the cattle that they had received.

Q. 152. That day or the day before?

A. That day and the day before.

Q. 153. Did they give it to him? A. No, sir.

Q. 154. Did they refuse to give him the money?

A. No, sir. They presented the same figures, and also the money that was due him for the cattle which were delivered.

Q. 155. Well, did they say anything when they did this?

A. They explained to him the cattle they had received.

Q. 156. What explanation did they make—what did they say? A. What did who say?

Q. 157. McNamara or Marlow?

A. They said they would pay him for the cattle, and

they produced this piece of paper with the figures on, and the money that was coming to them, for the cattle they had received the day before and that day, and the 457 head of cattle that they were holding and the 500 horses.

Q. 158. Did they tell him all this?

A. They did, and figured it up, and offered him this $9,675.

Q. 159. How much did Mr. Sharp claim was coming to him then? A. Didn't claim anything.

Q. 160. Was that $9,675 all for the cattle that was delivered that day and the day before?

A. No, sir.

Q. 161. How much did it lack?

A. I don't know at all.

Q. 162. Do you remember what the contract price of the cattle was, Mr. Knoell? A. Yes, sir.

Q. 163. How much was it?

A. Twenty-five dollars a head.

Q. 164. Now, if they had delivered 626 head of cattle the day before and 307 that day— A. Yes, sir.

Q. 165. Well, how much would that come to?

A. I don't know.

Q. 166. You know that the $9,675 wasn't payment for these cattle, don't you?

A. It wasn't payment for them.

Q. 167. What else was said there with reference to this matter that you recall, anything—have you told the whole story now?

A. I think I have. Mr. Sharp refused to take the money; wouldn't accept the money, and wouldn't settle with them.

Q. 168. They wouldn't pay him the money?

A. They said they would pay if they would bring the the cattle and horses in?

Q. 169. They said they would pay if they would bring the cattle and horses in?

A. They said they would pay him $9,075 for the whole works, if they would bring them in.

Q. 170. What did Mr. H. L. Niedringhaus have to say?

A. Didn't have a word to say. Mr. Sharp said that Mr. W. F. Niedringhaus refused to pay for the shortage.

Q. 171. Did Mr. Niedringhaus—or rather Mr. Sharp—say anything about anybody having broken the contract?

A. No, sir; not that I heard.

Q. 172. Have you told now all that took place at that conversation that you can recall that transpired?

A. About all at that time, only Mr. McNamara said that he would bet him a suit of clothes that Mr. W. F. Niedringhaus never said that, that he refused to pay the shortage.

Q. 173. Where was Mr. W. F. Niedringhaus at this time?

A. He wasn't there I don't know where he was.

Q. 174. He didn't take the bet then? A. No, sir.

Q. 175. Well, what time in the course of events was it when this took place—was it earlier in the game or later on?

A. Oh, later on, after it had drifted into a general talk.

Q. 176. No bad feeling over it?

A. No, not at all; they were talking their business matters over.

Q. 177. Well, how long did this take? How long was it from the time Sharp and Mr. H. L. Niedringhaus came there, till they went away again?

A. Oh, it might have been three-quarters of an hour, or something like that—more or less.

Q. 178. Talk an hour?

A. Somewhere's along there; I couldn't say for certain.

Q. 179. Couldn't say for certain? A. No, sir.

Q. 180. How long did the interview that took place that morning occupy, Mr. Knoell?

A. Not very long.

Q. 181. Well, about how long?

A. Five minutes or ten minutes; fifteen or twenty minutes; might have been a little longer.

Q. 182. After they left the tent did you see where they went to, Sharp and Niedringhaus—H. L.?

A. They went down to the store there.

Q. 183. How long before you saw them again?

A. Not very long. I couldn't say just how long it was.

Q. 184. Where did you see them next?

A. I saw them around the store, and the stockyards and all around there.

Q. 185. Well, when was it that these horses were brought in that you have mentioned to Mr. McIntire and turned into the stockyards?

A. They were brought in some time that morning or afternoon; about noon.

Q. 186. About noon?

A. Yes, I don't remember the exact time.

Q. 187. How long after this interview? It was after this talk with McNamara and Marlow and Niedringhaus, was it? A. Not very long after that.

Q. 188. How long would you think, Mr. Knoell, you were there? A. Oh, I couldn't say how long.

Q. 189. You were there, weren't you?

A. Yes, sir.

Q. 190. There all that day? A. Yes, sir.

Q. 191. Didn't leave until the next day; didn't leave Oswego until the 23d? A. Didn't leave when?

Q. 192. Didn't leave Oswego until the 23d of October?

A. Yes, sir; I did.

Q. 193. Did you leave on the evening of the 22d?

A. Yes, sir.

Q. 194. Well, you went back there again on the 23d?

A. Went back again on the night of the 22d.

Q. 195. Back on the night of the 22d?

A. Yes, sir.

Q. 196. Now, when these horses were brought into the corral there, where were you and Mr. McNamara and Marlow?

A. They was around the stockyards some place. I don't know where they was.

Q. 197. You don't recall where you was?

A. In the stockyards somewhere.

Q. 198. How far was it from the stockyards to your tent? A. About four or five hundred yards.

Q. 199. Who else was around the stockyards when the horses were brought in except yourself?

A. Oh, there was a lot of different men around there.

Q. 200. Any representative of this defendant company?

A. Not that I remember of. Blackman was there when they were driving the horses in.

Q. 201. Loss didn't bring the horses in himself, did he?

A. I don't remember. I saw him around the yards so often.

Q. 202. Don't you remember that Loss was there after this talk with Sharp? A. I don't know.

Q. 203. Where were these horses brought from?

A. They were there holding them; they just brought them from the pasture.

Q. 204. Were they there in the pasture?

A. They had been, part of them. A part of them were there holding these cattle, and then they put them all together.

Q. 205. How far is it from Oswego to the Home ranch of the Lazy N. outfit?

A. Two miles and a half in this side of the river, and about two miles and a half when you get to the river.

Q. 206. Well, where did you first see Mr. McNamara and Mr. Marlow after the horses were put in the corral?

A. Well, I seen them in the corral; I seen them in there.

Q. 207. Well, you went in with them?

A. I don't remember; I don't think I did, though.

Q. 208. Didn't you go and tell them the horses were in the corral, and you and them walked up to the corral together? A. No, sir; I did not.

Q. 209. Are you positive about that?

A. I think I am.

Q. 210. Well, when you got to the corral with Messrs. McNamara and Marlow, who was there representing The Home Land and Cattle Company?

A. I didn't go to the corral.

Q. 211. Well, when you were all there together, you were with Mr. McNamara and Marlow that afternoon?

A. Yes, sir.

Q. 212. Who was representing The Home Land and Cattle Company? A. Mr. Sharp.

Q. 213. Now, what took place between Mr. Sharp and Mr. McNamara and Marlow, that fell under your observation? A. Nothing right then.

Q. 214. Not right then?

A. No, sir; not that I know of.

Q. 215. Well, how soon after did anything take place?

A. Nothing that I know of.

Q. 216. You counted these horses?

A. Yes, sir.

Q. 217. Anybody else count them?

A. Mr. McNamara and Mr. Blackman.

Q. 218. Had anything been said by Sharp or Niedring-

haus or Marlow or McNamara up to this time that you heard?

A. No, I didn't hear anything about the horses until I began to count them. That is the first thing I heard.

Q. 219. Well, they counted the horses, did they?

A. Yes, sir.

Q. 220. And they finally got 500 head into one yard?

A. Yes, sir.

Q. 221. Then did you hear anything said between them?

A. Yes, sir; after that I did. Mr. Sharp demanded the draft for the horses right there and then, and they demanded pay for the balance of the cattle, and they said they would settle for the whole business, but they refused to do this; they wouldn't do it.

Q. 222. What then happened?

A. Mr. Marlow tendered them the sum of money—the same amount of money that he had before.

Q. 223. How did he do it?

A. Offered them the money.

Q. 224. Where was Mr. H. L. Niedringhaus?

A. He was there.

Q. 225. It was in his presence? A. Yes, sir.

Q. 226. Anything said or done about paying for the cattle that had been received that day and the day before by Mr. Sharp? A. Not to my knowledge.

Q. 227. Mr. Sharp say anything about a breach of the contract there at that time?

A. Not that I know of.

Q. 228. If he did say it, you didn't hear it?

A. I didn't hear him say anything about the contract.

Q. 229. Then what took place after Mr. Sharp had declined to receive this money?

A. Well, they demanded that he bring the cattle in, this 457 head.

Q. 230. Did they do so?

A. No, sir, McNamara and Marlow said if they would bring the cattle in they would settle for the whole business.

Q. 231. They said if they would bring the cattle in they would settle for the whole business?

A. They said if they would bring the cattle in they would settle the whole business.

Q. 232. Who said this?

A. Mr. McNamara and Marlow.

Q. 233. Well, what did Mr. McNamara and Mr. Marlow say?

A. They told them to bring the cattle in and they would settle for them.

Q. 234. Well, did they bring the cattle in?

A. No.

Q. 235. Is that all that took place at that time, or was there something further said or done between those parties? Is that the whole story?

A. All of it, I guess.

Q. 236. Well, if that is all, we will quit; if there is anything more I would like to have it.

A. I guess that it is all I know about it.

Redirect Examination.

Q. 1. Mr. Knoell, these animals that were held in the neighborhood of Oswego, what would be done with them there from day to day and from night to night; what was done with them, were they grazing around there?

A. They were holding and grazing them around there.

Q. 2. Now, in grazing animals in that way, they wouldn't keep them in one place all the time, would they?

A. No, sir; sometimes you have to take them five, six, or seven miles to get water for them.

Q. 3. Now, I will ask you when this bunch of 307 head were driven to Poplar Agency, did you yourself hire any extra man to help on that drive?

A. Yes, sir; I did.

Q. 4. How many men did you hire? A. Three.

Q. 5. And where did you first get those men?

A. I got them there at Oswego.

Q. 6. Men that were living around there?

A. Men that had been at work there, and had got through.

Q. 7. You hired some of The Home Land and Cattle men did you, Mr. Knoell?

A. Yes, sir; some of them that had been working for them and had got through.

Recross-Examination.

Q. 1. So these were not men that McNamara and Marlow had there?

A. We had men around there; but it took more than two men to take them down there; it took five men.

HERMAN F. KNOELL.

Subscribed and sworn to before me this 31st day of January, 1899.

HENRY N. BLAKE,
Master in Chancery.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

C. J. McNAMARA and T. A. MARLOW, Copartners Doing Business Under the Firm Name and Style of McNamara and Marlow,
Complainants,
vs.
HOME LAND AND CATTLE COMPANY and THE NATIONAL BANK OF COMMERCE,
Defendants.

Testimony in Rebuttal.

Be it remembered that on this 20th day of May, 1899, in pursuance of the stipulations hereto attached, H. G. McIntire appearing as counsel for plaintiffs, and E. C.

Day appearing as counsel for defendants, the plaintiffs in the above-entitled action, in order to support their action, offered in rebuttal of the testimony taken by the defendants herein, the testimony of C. J. McNamara and Thomas A. Marlow, witnesses who were produced in person, and who being by me first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

C. J. McNAMARA, a witness on behalf of the plaintiffs.

Direct Examination.

(By H. G. McINTIRE, Esq.)

Q. In the testimony offered by A. W. Niedringhaus on behalf of the defendant herein, and on page 69 of the typewritten copy of the same, appears the following:

"Q. You may detail what took place on October 21 relative to the delivery of cattle, giving the conversations that you had with Messrs. McNamara and Marlow.

"A. When they stepped off the train I started to show Mr. McNamara my power of attorney from the bank, and asked him if he wanted to read it. Mr. McNamara said that he had received what he supposed was a copy of the same thing and it was not necessary for him to read it. Shortly after that I told Mr. McNamara in the presence of Mr. Sharp that we would have to have a draft for cattle as they were delivered. Mr. McNamara replied that as the mail east had already left, I could not mail it anyway until the next day and he wanted a delivery for Poplar, and if I would wait until

the following day—this would be the 22d—he would give me a draft for the beefs loaded on the 21st and cattle going to Poplar. I told him that would be satisfactory."

Q. What have you to say as to that, Mr. McNamara?

By Mr. DAY.—To which the defendants object on the ground that the same is not rebuttal testimony, the witness having attempted to detail what took place at this meeting in the evidence in chief.

(Overruled. H. N. B.-M.)

A. Mr. Niedringhaus never asked me anything about giving a draft for the cattle when we got off there; in fact, never said anything about a draft until the next day at my tent at which time I turned him over to Mr. Marlow.

Q. The next day at your tent was that before or after the delivery of the cattle that went to Poplar?

A. After the delivery.

Q. I will ask you whether in the conversation detailed in the first question herein you ever promised or told Mr. Niedringhaus that you would give him a draft?

A. No, sir; I never did.

Q. This conversation, as I understood it, occurred as soon as you arrived at Oswego, did it not?

A. About that time, yes, sir.

Q. Had any cattle at all been delivered at that time?

A. No, sir.

Q. Again, Mr. McNamara, in the testimony of Mr. Sharp contained on page 149 of the typewritten copy thereof, Mr. Sharp says as follows, referring to the con-

versation had at Oswego, October 21, 1897: "Albert Niedringhaus told him that in accordance with the terms of that power of attorney he would say that he would have to have a draft for the cattle as they were delivered." I now ask you, Mr. McNamara, whether Mr. Niedringhaus told you anything of the kind.

By Mr. DAY.—Objected to as not proper rebuttal testimony.

(Overruled. H. N. B.-M.)

A. No, sir.

Q. Do I understand, then, that nothing was said by Mr. Niedringhaus with reference to any draft at the conversation referred to?

A. Nothing was said about a draft.

Q. In the delivery of the cattle under the contract set out in the complaint herein, Mr. McNamara, did you or anyone in behalf of your firm at any time insist or dictate the method by which the cattle were to be delivered? A. No, sir; we never did.

Q. State, if you please, how the cattle were delivered and received by you.

By Mr. DAY.—Objected to as not proper rebuttal testimony.

(Sustained. H. N. B.-M.)

A. Whenever they had cattle ready to turn over they would notify us either by letter or wire, and then I would go there and on my arrival Mr. Blackman would usually ask me what kind of cattle I wanted, whether steers or stock cattle, and I would tell him what class of cat-

tle I would prefer first. That was all I ever had to do with the cattle—take what they would give me.

Q. Was that course pursued on October 21st to 22d?

A. Yes, sir; the cattle had to be classed there before they were loaded as there were two kinds of cattle; they merely asked me for convenience what kind I wanted to load first.

Q. In the testimony of Mr. Blackman taken on behalf of the defendants herein, and on page 106 of said testimony, appears the following: "After the horses had arrived I went in the lead to open the corral gate. When at the corral gate, Mr. McNamara and Mr. Marlow were both standing on the back side of the corral talking apparently. Mr. McNamara says, 'Blackman, you need not pen them horses for I am not going to take them.' I says, 'I can't help that, Mr. McNamara, if you receive them or not I have orders to pen those horses and I'll do it.' Mr. McNamara says all right." Please tell us what you have to say with reference to that testimony.

A. I never told Mr. Blackman not to pen the horses or that I would not take the horses; I merely asked Mr. Blackman if they intended to give us the horses.

Q. Mr. McNamara, I will ask you whether in any conversation with Mr. Sharp he ever asked you whether you would dispense with the putting of cattle in the corral on October 22d, 1897.

A. No, I don't remember as to that.

Q. I will ask you whether Mr. Sharp or anyone on behalf of the defendants ever made any unconditional ten-

der of either the horses or cattle to you or Mr. Marlow on October 22d, 1897?

A. I don't understand the question. All I understand is this, he brought the horses in there and then refused to let us have them; Mr. Marlow and him had some talk in the corral when I was not present.

Q. Did Mr. Sharp or anyone on behalf of the defendants offer you any cattle or horses on October 22d, 1897?

A. Yes, sir.

Q. When such offer was made did he ask or insist that you do anything?

A. He insisted upon our giving him a draft for the stuff before he would deliver.

Q. So that offer or tender made on October 22d, 1897, was accompanied by the condition that you would give him a draft for the cattle to be delivered?

A. Yes, and the horses and the 457 head of cattle out there.

Q. What did he insist upon a draft for?

A. For the payment for these horses and the 457 head of cattle and also the cattle received that morning and the day before.

Q. In other words, he insisted on a draft for all that had been delivered and that were to be delivered before he would deliver? A. Yes, sir.

Cross-Examination.

(By Mr. E. C. DAY.)

Q. Was anything said at the time you first met Mr. A. W. Niedringhaus at Oswego on October 21st about the delivery of any cattle for the Poplar River Agency?

A. Yes, sir.

Q. What was said?

A. He said that he would turn me over a trainload that evening and give me the Poplar cattle the next morning; I don't know that he said it either; it was either he or Mr. Blackman said it.

Q. Was that stated by them in response to any request of yours to cut the cattle out so that they could be sent to Poplar?

A. No, they just merely asked me what I wanted and I told them I wanted a trainload that day and the Poplar River cattle in the morning unless we could handle them all that day.

Q. In the deliveries of cattle did the defendants at any time ever deliver to you more cattle than cars had been provided for by you?

A. No; we always had cars enough there to take the cattle as fast as they could give them to us.

Q. And the cattle, as I understand it, were cut from the larger herd to fill the cars as they were provided at the station?

A. They were generally brought in trainload lots; yes, sir.

C. J. McNAMARA.

Subscribed and sworn to before me this 20th day of May, 1899.

CHAD A. SPAULDING,

Notary Public in and for the County of Lewis and Clarke, State of Montana.

T. A. MARLOW, a witness on behalf of the plaintiff, being first duly sworn, testified as follows, to wit:

Direct Examination.

(By H. G. McINTIRE, Esq.)

Q. Mr. Marlow, I believe in your direct examination you testified that you were in the tent when Mr. Sharp came around there the morning of the 22d of October, after the delivery of the cattle that went to the Poplar Agency, did you not? A. Yes, sir.

Q. I will ask you whether at that time when Mr. Sharp came in the tent anything was said by him that would indicate that a draft had been promised to him by Mr. McNamara the day before for cattle received?

A. No, sir.

Q. What did Mr. Niedringhaus say?

A. He came up and asked for a settlement on the two lots of cattle that had been previously delivered. He first took his receipt for the last batch that had been delivered, and then asked for a draft in payment of the two lots.

Q. Was Mr. Blackman in the tent at the time when Mr. Niedringhaus first came up?

A. No, sir; he was not.

Q. He came after that, did he? A. Yes, sir.

Q. He was, however, in the tent when Mr. Sharp was there, was he?

A. Yes, sir; my recollection is that he was.

Q. You were standing with Mr. McNamara were you at the time Blackman was putting the horses in the pen?

A. Yes, sir; McNamara and I were together at one of the wings of the stockyard.

Q. Did Mr. McNamara at that time tell Blackman that he, Blackman, need not put the horses in the pen for you were not going to take them?

A. He did not.

Q. You were present also, I believe, were you not, when Sharp, on behalf of the defendants, spoke to yourselves with regard to the putting of cattle in the pen on October 22d, 1897? A. I was.

Q. I will ask you now, Mr. Marlow, whether Mr. Sharp or anyone on behalf of the defendants at that time or at any time on October 22d, 1897, offered or tendered you any horses or cattle under he contract without conditions? A. They did not.

Q. They made offers or tenders to you, however, did they not? A. Yes, sir.

Q. When these various offers or tenders of the cattle or horses were made to you, what was said with reference to any conditions to be performed by you gentlemen?

A. The horses were first put into the corral and we selected the 500 head and they refused to deliver unless we gave them a draft for the horses; we then tendered them this $9,700.00 and gave them a statement as we had in the forenoon, and on that he refused to deliver; he then stated that he would not pen the cattle unless we would give him our word in advance that we would give him a draft for these cattle when they were counted

out, also for the horses; and cattle we had had the day before and also that day.

Q. Any tender he made of the horses and cattle was coupled with that proviso? A. Yes, sir.

Cross-Examination.

(By E. C. DAY, Esq.)

Q. There was no other condition except payment attached to the tender, was there?

A. No other, except that we would agree to give a draft as soon as the stuff was delivered.

Q. For the stuff that had been and was being delivered? A. Yes.

THOMAS A. MARLOW.

Subscribed and sworn to before me this 20th day of May, A. D. 1899.

CHAD A. SPAULDING,
Notary Public in and for the County of Lewis and Clarke,
State of Montana.

With the foregoing testimony and the stipulation between counsel, dated March 14, 1899, the plaintiffs now rest.

State of Montana,
County of Lewis & Clarke. } ss.

I, Chad A. Spaulding, a notary public in and for Lewis and Clarke County, State of Montana, do hereby certify that the witnesses, C. J. McNamara and Thomas A. Marlow, in the foregoing deposition named, were by me duly

sworn to testify the truth, the whole truth, and nothing but the truth in said cause; that said deposition was taken at the time and place mentioned, to wit, at my office, room 23 Montana National Bank Building, Helena, Montana, on the 20th day of May, 1899, at two o'clock P. M.; that said deposition was reduced to writing by me and when completed was by me carefully read to said witnesses; and being by them corrected was by each of said witnesses subscribed in my presence.

In witness whereof, I have hereunto subscribed my name and affixed my seal of office this 20th day of May, A. D. 1899.

CHAD A. SPAULDING,

Notary Public in and for the County of Lewis and Clarke, State of Montana.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

C. J. McNAMARA and T. A. MARLOW, Copartners Doing Business Under the Firm Name and Style of McNamara and Marlow,

Complainants,

vs.

HOME LAND AND CATTLE COMPANY and THE NATIONAL BANK OF COMMERCE,

Defendants.

Stipulation as to Taking Rebuttal Testimony.

It is hereby stipulated and agreed that the testimony in rebuttal offered by plainiffs in the above action may be taken before Chad A. Spaulding, a notary public at room 23 in the Montana National Bank Building, Helena, Montana, on May 20th, 1899, at two o'clock P. M., stenographically, and when so taken shall be by him reduced to typewriting and signed and sworn to by the respective witnesses, and thereupon shall be by said notary public filed in this action, and shall thereupon have the same

force and effect as if the same had been taken before the master in chancery, Hon. Henry N. Blake, herein.

Dated May 20th, 1899.

H. G. McINTIRE,
WM. WALLACE,
Attorneys for Plaintiffs.
CULLEN, DAY & CULLEN,
Attorneys for Defendants.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

C. J. McNAMARA and T. A. MARLOW, Copartners Doing Business Under the Firm Name and Style of McNamara and Marlow,
Complainants,
vs.
HOME LAND AND CATTLE COMPANY et al.,
Defendants.

Stipulation Extending Time to Take Testimony in Rebuttal.

In this cause it is stipulated and agreed that plaintiffs may have thirty (30) days' time from date in which to introduce testimony on their behalf in rebuttal.

Dated April 29, 1899.

CULLEN, DAY & CULLEN,
Solicitors for Defendants.
H. G. McINTIRE,
Solicitors for Plaintiffs.

[Endorsed]: Title of court and cause. Complainants' testimony in rebuttal. Filed and entered May 22, 1899, Geo. W. Sproule, Clerk.

[Endorsed]: Title of court and cause. Testimony of complainants reported by Henry N. Blake, Master in Chancery. Filed and entered and published, June 27, 1899. Geo. W. Sproule, Clerk.

Complainants' Exhibit "A."

(H. N. Blake, Master.)

This agreement made and entered into this 27th day of May, A. D., 1897, at Chicago, county of Cook and State of Illinois, by and between The Home Land and Cattle Company, a corporation existing under the laws of the State of Missouri, by its President, Wm. F. Niedringhaus (hereafter called the party of the first part) and McNamara and Marlow of Big Sandy, Montana (hereafter called the parties of the second part), witnesseth:

That said party of the first part for and in consideration of the sum of one dollar and other valuable considerations hereby agrees to sell to the said second parties all of their herd of stock cattle, including steers, said herd consisting of thirty thousand head (30,000), more or less, now ranging upon the ranges in Valley, Dawson and Custer Counties, Montana, and being branded as follows, to wit:

 on right hip; N-N on left hip and side, and any other brands owned by said first party.

The terms and conditions of said agreement to sell are as follows:

First: Said cattle are to be gathered by said first party and counted out to said second parties at the stockyards at Nashua, or Oswego, Montana, on line of the Great Northern Railway during the regular round-up season of 1897, no cattle to be tendered or accepted later than November 1st, 1897; all stock cattle in said herd to be accepted by said second parties whenever tendered (prior to November 1st, 1897) in not less than trainload lots; all steers from three years old up, and all spayed heifers and dry cows to be delivered and counted at same points, when marketable for beef in the opinion of said parties of the second part.

Second: All calves of the season of 1897 to be delivered without count or charge to said second parties, whether branded or unbranded.

Third: No lumpy-jawed cattle to be counted in deliveries.

Fourth: Should the two parties to this contract at the close of deliveries for 1897 fail to agree upon a price at which said second parties shall purchase the Brands owned by said first party together with all cattle bearing same, said first party agrees during the round-up season of 1898 (prior to November 1st, 1898) to again gather all of the remainder of said herd that it can find with diligent work and deliver same to said parties of the second part at the same places and in the same manner and at same price as provided for the season of 1897.

Fifth: The price to be paid by said parties of the second part for said cattle is the sum of twenty-five dollars

($25.00) per head for each and every head delivered as above provided, payable upon the delivery of said cattle.

Sixth: Said first party hereby acknowledges the receipt of the sum of fifty thousand dollars ($50,000) as a first payment of said cattle, which sum is to deducted, $25,000.00 from the first deliveries made under this contract and $25,000.00 from deliveries not later than September 15th, 1897.

Seventh: Said second parties hereby bind themselves to accept and pay for said cattle at the price stated when the same are tendered to them, under the terms of this contract.

Eighth: Said first party hereby agrees to deposit with Messrs. Rosenbaum Bros. & Co. of Chicago, Ills., the written and acknowledged consent to this sale of all parties holding liens or mortgages of any kind against the cattle or property embraced in this contract upon the payment of the fifty thousand dollars ($50,000), stated as a first payment above.

Ninth: Said first party hereby guarantees to deliver to said second parties during the season of 1897 not less than nine thousand head (9,000) of steers of the ages of three years old and up and spayed heifers of the ages of four years and up. Should they fail so to do, they hereby agree to pay to second parties the sum of twenty dollars ($20.00) in cash for each and every head less than nine thousand (9,000) head of such cattle so delivered.

Tenth: At the end of the round-up season of 1897 the parties of the second part agree to purchase of party of the first part five hundred head of saddle and work

horses at the price of twenty dollars ($20.00) per head. Said horses to be selected by parties of second part from entire herd of 700 head of party of first part and to be serviceable and sound horses. Work and saddle horses to be selected in proportion.

This agreement to be binding upon the heirs, successors and assigns of both the parties hereto.

Witness our hands and seals this 27th day of May, A. D. 1897.

HOME LAND AND CATTLE COMPANY.
By WM. F. NIEDRINGHAUS, [Seal]
President.
McNAMARA & MARLOW. [Seal]

Witness:
CHARLES HAAS.
GEO. W. NIEDRINGHAUS.

Filed and entered June 27, 1899. Geo. W. Sproule, Clerk.

Complainants' Exhibit "B."

(H. N. Blake, Master.)

NATIONAL BANK OF COMMERCE in St. Louis.
Capital $3,000,000.

W. H. THOMPSON, President.
J. C. VAN BLARCOM, Cashier.

St. Louis, Oct. 14th, 1897.

Mess. McNamara & Marlow, Big Sandy, Montana.

Gentlemen: In accordance with the conditions in the contract of date, Chicago, Illinois, May 27th, 1897, between you and the Home Land & Cattle Company, we

advise you, that on Thursday, October 21st, 1897, there will be delivered to you by the Home Land & Cattle Company at the stock-yards at Oswego, Montana, about 820 head of beef cattle about 631 head of stock cattle and their herd of horses from which you are to make your selection of Five hundred.

We have appointed Mr. Albert W. Niedringhaus to represent us in the collection and receipting for this money, and have executed to him a power of attorney, a copy of which we herewith enclose you.

Yours truly,

J. C. VAN BLARCOM,

Cas.

Filed and entered Jun. 27, 1899. Geo. W. Sproule, Clerk.

Complainants' Exhibit "C."

(H. N. Blake, Master.)

Form No. 2.

THE WESTERN UNION TELEGRAPH COMPANY.

Incorporated.

21,000 offices in America.

Cable Service to All the World.

THOS. T. ECKERT, President and General Manager.

Receiver's No. z. Sent by: WN. Recd. by: O. F. Check 20 paid.

Send the following message subject to the terms on back hereof, which are hereby agreed to.

Received at 12:30 a. m., 189—.

Dated Wolf Point, Mont., 10-18.

To McNamara & Marlow, Big Sandy.

We will deliver you Oswego, twenty-first eight hundred twenty steers six hundred thirty-one stock cattle five hundred horses.

Albert W. Niedringhaus.

Filed June 27, 1899. Geo. W. Sproule, Clerk.

Complainants' Exhibit "D."

(H. N. Blake, Master.)

270 cows and heifers.
1 stag.
33 bulls.
50 steers 2 yr. old.
45 steers 1 yr. old.
27 heifers 2 yr. old.
31 heifers 1 yr. old.

457

All branded Z on right hip.

Filed and entered Jun. 27, 1899. Geo. W. Sproule, Clerk.

Complainants' Exhibit "E."

(H. N. Blake, Master.)

May 30th, 1898.

Home Land and Cattle Co., c-o Saint Louis Stamping Co., Saint Louis, Mo.

Gentlemen: Referring to article fourth of our contract with you for the purchase of the Z herd of cattle dated May 27th, 1897, by which deliveries for the present season are provided for, no trade for the brand having been made, we hereby beg to notify you that we are prepared to receive the remainder of the cattle as called for by said contract and hereby request that you proceed to gather and deliver same as provided therein without branding the calves of 1898. Your acknowledgment of this letter will oblige,

Yours truly,

McNAMARA & MARLOW,

Filed and entered Jun. 27, 1899. Geo. W. Sproule, Clerk.

Complainants' Exhibit "F."

(H. N. Blake, Master.)

W. F. Niedringhaus, President. F. G. Niedringhaus, Vice-President. Alex. Niedringhaus, Secretary.

Office of HOME LAND AND CATTLE COMPANY.

St. Louis, June 9, 1898. 18—.

Ranges:

Texas.

Montana.

New Mexico.

Messrs. McNamara & Marlow, Big Sandy, Mont.

Gentlemen: Your letter of date May 30th, 1898, to this company, is at hand. You, by your own actions, having broken the contract, we do not intend to make any further deliveries. We do not desire to sell our cattle and then not receive the contract price in return.

Yours truly,

HOME LAND & CATTLE CO.

F. G. Niedringhaus,

V. P.

Filed and entered Jun. 27, 1899. Geo. W. Sproule, Clerk.

Complainants' Exhibit "G."

(H. N. Blake, Master.)

Home Land & Cattle Co., in ac. with McNamara & Marlow.

Credits for Cattle Received.

1897.					
July 11.	By 1,726 Head a	$25	J. F. 321	$43,150	43,150
July 20.	By 1,409 Head a	$25	J. F. 322	35,225	35,225
July 29.	By 679 Head a	$25	J. F. 322	16,975	16,975
Aug. 16.	By 3,399 Head a	$25	J. F. 326	84,975	84,975
Aug. 23.	By 3,806 Head a	$25	J. F. 326	95,150	95,150
Sep. 4.	By 2,351 Head a	$25	J. F. 330	58,775	58,775
Oct. 2.	By 1,649 Head a	$25	J. F. 334	41,225	41,225
Oct. 22.	By 933 Head a	$25	J. F. 334	23,325	
Nov. 30.	By 148 Stays a	$25	J. F. 341	3,700	27,025
Total	16,100		To Balance Due us:		10,275
					$412,775

Complainants' Exhibit "G" (Continued).

Settlements.

	C. B.		
6. 7.97.	39 R. Bros. & Co., ½ first payment.... 25,000		
	C. B.		
7.12.97.	65 Dft. No. 1 on R. Bros. & Co., to N. Bk C... 18,150		43,150
	C. B.		
7.22.97.	75 Dft. No. 2. on R. Bros. & Co., to N. Bk. C..... ...		35,225
	C. B.		
7.29.97.	81 Dft. No. 3 on R. Bros. & Co., to N. Bk. C..... ..		16,975
	C. B.		
6. 7.97.	39 R. Bros. & Co., ½ first payment.. 25,000		
	C. B.		
8.16.97.	93 To Do. due them By H. L. & C. Co... 50,000		
	C. B.		
8.16.97.	93 Dft. on R. Bros. & Co., No. 4 to N. Bk. C..... .. 9,975		84,975
	C. B.		
8.23.97.	99 Dft. on R. Bros. & Co., No. 8 to N. Bk. C.....89,859.70		
	C. B.		
8.23.97.	99 R. Bros. & Co., bal. due them by H. L. & C..... 5,290.30		95,150

	C. B.	
9. 2.97.	109 Dft. on R. Bros. & Co.,	
	No. 9 to N. Bk. C.....12,675	
	C. B.	
9. 3.97.	109 Dft. on R. Bros. & Co.,	
	No. 10 to N. Bk. C.....12,675	
	C. B.	
9. 4.97.	109 Dft. on R. Bros. & Co.,	
	No. 11 to N. Bk. C.....33,425	58,775
	C. B.	
10. 1.97.	129 Dft. on R. Bros. & Co.,	
	No. 12 to N. Bk. C.....13,025	
	C. B.	
10. 2.97.	129 Dft. on R. Bros. & Co.,	
	No. 14 to N. Bk. C.....13,825	
	C. B.	
10. 2.97.	129 Dft. on R. Bros. & Co.,	
	No. 15 to N. Bk. C.....14,375	41,225
	J. F.	
11.30.97.	341 1865 steers short at $20	37,300
		$412,775

Filed and entered Jun. 27, 1899. Geo. W. Sproule, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

CORNELIUS J. McNAMARA and THOMAS A. MARLOW, Copartners as McNamara and Marlow,
Complainants,

vs.

THE HOME LAND AND CATTLE COMPANY and THE NATIONAL BANK OF COMMERCE,
Defendants.

Stipulation as to Shipment of Cattle, etc.

It is hereby stipulated and agreed that in the year 1898 the defendant Home Land and Cattle Company rounded up and gathered in the State of Montana five hundred and ten (510) cattle of the brands mentioned in the complaint herein classified as follows: 232 steers, 165 cows, 42 bulls, 4 heifers, 67 calves; that the same were shipped by said Home Land and Cattle Company to and sold at Chicago, Illinois, and realized the sum of $15,256.00, which money was paid to said Home Land and Cattle Company.

Dated March 14, 1899.

H. G. McINTIRE,
WM. WALLACE,
Solicitors for Complainants.
CULLEN, DAY & CULLEN,
Solicitors for Defendants.

[Endorsed]: Title of court and cause. Stipulation as to cattle shipped and amount realized in 1898. Filed March 14, 1899. Geo. W. Sproule, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

CORNELIUS J. McNAMARA and THOMAS A. MARLOW, Copartners Under the Firm Name and Style of McNamara and Marlow,

Plaintiffs,

vs.

HOME LAND AND CATTLE COMPANY, and THE NATIONAL BANK OF COMMERCE.

Defendants.

Assignment of Errors.

Come now The Home Land and Cattle Company and the National Bank of Commerce of St. Louis, Missouri, by their solicitors and counsel, and say that in the decree of the court herein made and entered on the 14th day of December, A. D. 1900, and in the records and proceedings therein, there is manifest error in this, to wit:

I.

That the Court erred in overruling the exceptions of the defendants to the report of the master, on the ground that such exceptions had not been presented to the master, for the reason that the said exceptions were exceptions drawn and filed in the said court under and in accordance with the provisions of Equity Rule No. 83, and were exceptions to the rulings made by the master upon matters which had been fully presented to him.

II.

The Court erred in overruling defendant's exception No. 2, upon the ground that the consideration of the same would require it to review all of the evidence in the case, for the reason that the said exception was drawn under and in accordance with the provisions of Equity Rule No. 83 and specifically pointed out the particular evidence relied upon to support the exception.

III.

The Court erred in refusing to consider the defendants' exceptions Nos. 3 and 6, for the reason that the findings therein mentioned were immaterial to the consideration of this cause.

IV.

The Court erred in refusing to consider the defendants' exception No. 4, for the reason that the said exception was taken to a finding purporting to be a finding of fact, whereas the same was a conclusion of law.

V.

The Court erred in refusing to consider the defendants' exception No. 5 to finding No. 22, for the reason that the said finding reported by the master was incomplete and the Court was not bound thereby.

VI.

The Court erred in refusing to consider the defendants' exception No. 7, being exception to the conclusions of law of the master Nos. 1 and 2, for the reason that the said conclusions were not supported by the findings of fact and were against the law and the Court was not bound by the conclusions of law of the master, although no objection had been taken to them before him.

VII.

The Court erred in refusing to consider the defendants' exception No. 8, being an exception to the master's conclusion of law No. 3, and in holding that the conclusion of law as found by the master was correct, for the reason that the said conclusion of law so found by the master was immaterial to any of the issues in the said cause as made by the pleadings.

VIII.

That the Court erred in refusing to consider the defendants' exceptions to finding No. 17, and in adopting the findings of the master as therein stated, for the reason that the same was immaterial to any of the issues in the cause.

IX.

The Court erred in holding that the contract sued on was not what is termed a severable contract, for the reason that by the express terms of the contract, payment for the cattle was to be made upon the delivery thereof in trainload lots, and it does not appear from the finding that the plaintiffs refused to pay for the cattle on the ground that such delivery was not made in trainload lots, and therefore under and by virtue of the terms of the contract, payment for deliveries made became a necessary condition precedent to any further demand for deliveries.

X.

The Court erred in holding that The Home Land and Cattle Company did not demand a rescission of the contract on the ground or on account of the failure to make payment for cattle delivered, for the reason that it was not necessary that the said company should do more than demand payment for such deliveries before proceeding with other deliveries, and to refuse to make further deliveries until payment was received.

XI.

The Court erred in holding that the plaintiffs were not required to pay the amount due for the cattle delivered as found by the master, before demanding other deliveries, for the reason that by the terms of the contract the plaintiffs expressly agreed to pay for such cattle when delivered in trainload lots, and it appears from the findings of the master that trainload lots of cattle had been

delivered for which payment had not been made at the time that the defendants demanded the draft for the sum of twenty-three thousand three hundred twenty-five dollars ($23,325.00), as set forth by the master in finding No. 11.

XII.

The Court erred in finding that The Home Land and Cattle Company was insolvent so far as the jurisdiction of Montana is concerned, and that for that reason the plaintiffs' remedy at law would be inadequate, for the reason that the master found and the Court has adopted the finding that The Home Land and Cattle Company was solvent, and the fact that such solvency did not exist in the State of Montana, was not of itself sufficient equity to give the Court jurisdiction to decree specific performance of the contract for the sale of personal property.

XIII.

That the Court erred in holding that it had jurisdiction to enforce specifically the performance of the contract in suit, and in holding and adjudging the specific performance of the said contract, for the reason that the said contract was one for the sale and delivery of goods and chattels, and there was not shown any reason why an action for damages upon the said contract would not be an adequate remedy for the breach thereof, if any breach occurred.

XIV.

That the Court erred in finding that The Home Land and Cattle Company and the National Bank of Commerce had failed to perform the said contract, so far as the same was required to be performed by them, for the reason that it appeared from the said contract and the findings of fact as reported by the master that the delivery of cattle had been made to plaintiffs for which plaintiffs had refused payment, and therefore said defendants were excused from any further performance of the said contract.

XV.

That the Court erred in adopting the findings of the master No. 11, in so far as the said finding established the balance due the defendants for the alleged shortage of cattle, and in so far as it finds that the plaintiffs tendered to the defendant the amount due under the said contract for cattle delivered, in this, that it appears from the said findings that the said shortage was based upon an estimate of twenty dollars per head for the amount of steers and spayed heifers not delivered less than 9,000, and for the reason that clause nine of the contract in suit, which provided for the payment of the sum of twenty dollars per head for each and every head less than 9,000 not delivered, was an attempt to provide stipulated damages for the breach of said contract, and was, under the laws in force in the State of Montana, where the said contract was to be performed, at the time it was to be performed, null and void, and the plaintiffs were

not entitled to any amount for steer shortage other than the difference between the market value of the cattle at the time the said contract was to be performed and the contract price as specified in the said contract.

XVI.

The Court erred in adopting the master's first conclusion of law to the effect that the plaintiffs had performed, or been ready and willing at all times to perform, all the terms and conditions of the contract in suit on their part to be performed, for the reason that it appears from finding No. 11 that the delivery of cattle, amounting to 933 head, had been made to the plaintiffs, for which payment thereof had not been made to the defendants, and the tender claimed to have been made by the plaintiffs to the defendants of the sum of nine thousand six hundred seventy-five dollars ($9,675) was not a tender of the amount due the said defendants for the said cattle so delivered to them; nor was it a tender of the amount due the defendants after allowing for the claim of shortage under the ninth clause of the said contract, for the reason that the stipulations of the ninth clause as to the allowance of twenty dollars per head for cattle less than the nine thousand specified therein, was, under the law in force in the state of Montana, where the said contract was to be performed, at the time it was to be performed, null and void, and the only amount which the plaintiffs were entitled to deduct for said shortage, if, any, was the difference between the market value of the cattle at the time the said contract was to be performed

and the contract price as specified which, by finding No. 16, was the sum of five dollars per head.

XVII.

That the Court erred in adopting the second conclusion of law of the master, to the effect that the defendant, The Home Land and Cattle Company, had not performed the terms and conditions of the said contract upon its part to be performed, for the reason that by the master's finding of fact No. 11 it appears that the defendants were ready and willing to deliver the 457 head of stock cattle referred to in said finding upon compliance with the terms of the contract by the plaintiff, and it further appears from the said finding that the plaintiffs did not perform or tender performance of the terms of said contract to be performed by them.

XVIII.

That the Court erred in decreeing the specific performance of the contract in suit, by the delivery to the plaintiff of the 457 head of stock cattle described in the complaint, for the reason that the Court had no jurisdiction to specifically enforce the performance of a contract for the sale of personal property.

XIX.

That the Court erred in decreeing the specific performance of the contract in suit by the delivery to the plaintiffs of the 457 head of stock cattle described in said decree, for the reason that the plaintiffs have not paid or tendered to the defendants the amount to be paid for the

cattle, as in the said contract provided, nor have they performed the terms and conditions of said contract to be performed by them.

XX.

That the Court erred in entering its said decree in favor of the plaintiffs and against these defendants, and in not holding that it had no jurisdiction to specifically enforce the contract sued on, and in not ordering the said suit to be dismissed at the cost of the plaintiffs.

Wherefore, the said Home Land and Cattle Company and the National Bank of Commerce pray that the decree of the Circuit Court of the United States for the District of Montana, herein made and entered on the 14th day of December A. D. 1900, be reversed, and that the said Circuit Court of the United States for the District of Montana be ordered and directed to enter a decree dismissing the plaintiffs' bill of complaint at the costs of the plaintiffs.

CULLEN, DAY & CULLEN,
Gold Block, Helena, Montana,
Solicitors for Defendants and Appellants.

FIDELIO C. SHARP,
902-909 Union Trust Building, St. Louis, Mo.,
Of Counsel.

Filed and entered Jan. 9, 1901. Geo. W. Sproule, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

CORNELIUS J. McNAMARA and THOMAS A. MARLOW, Copartners Under the Firm Name and Style of McNamara and Marlow,

Plaintiffs,

vs.

HOME LAND AND CATTLE COMPANY and THE NATIONAL BANK OF COMMERCE.

Defendants.

Petition for Order Allowing Appeal.

Come now the above-named defendants, conceiving themselves aggrieved by the decree made and entered in the above-entitled cause on the 14th day of December A. D. 1900, wherein and whereby it was ordered, adjudged, and decreed that the agreement and contract entered into between the plaintiffs and the defendant, The Home Land and Cattle Company, bearing date the 27th day of May A. D. 1897, and set forth in the bill of complaint herein, be specifically performed and fulfilled, and that the receiver heretofore appointed herein do turn over

and deliver to the plaintiffs herein 457 head of stock cattle in his possession or the proceeds thereof, and that the said defendant pay to the said plaintiffs their costs and disbursements incurred herein, taxed at five hundred forty-five and 15-100 dollars ($545.15), do hereby petition the Court for an order allowing the defendants to prosecute an appeal from the said decree so made and entered on the 14th day of December, 1900, and from the whole thereof, to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, District of Montana, under and according to the laws of the United States in that behalf made and provided. And also that an order be made fixing the amount of security which the said defendants shall give and furnish upon such appeal. And your petitioners will ever pray.

CULLEN, DAY & CULLEN,
Gold Block, Helena, Montana,
Solicitors for Defendants.

FIDELIO C. SHARP,
902-909 Union Trust Building, St. Louis, Mo.,
Of Counsel.

Filed Jan. 9, 1901. Geo. W. Sproule, Clerk.

At a stated term, to wit, the November Term A. D. 1900, of the Circuit Court of the United States of America, Ninth Circuit in and for the District of Montana, held at the courtroom in the city of Helena, Montana, on Monday, the 9th day of January in the year of our Lord one thousand nine hundred and one. Present the Honorable HIRAM KNOWLES, United States District Judge for the District of Montana, Sitting as Circuit Judge.

CORNELIUS J. McNAMARA and THOMAS A. MARLOW, Copartners Under the Firm Name and Style of McNamara and Marlow,

Plaintiffs,

vs.

HOME LAND AND CATTLE COMPANY and THE NATIONAL BANK OF COMMERCE.

Defendants.

Order Allowing Appeal and Fixing Amount of Bond.

On motion of Messrs. Cullen, Day & Cullen, solicitors for defendants, it is ordered that an appeal to the United

States Circuit Court of Appeals for the Ninth Circuit from the final decree heretofore filed and entered herein on the 14th day of December A. D. 1900, be, and the same is hereby, allowed, and that a certified transcript of record, testimony, exhibits, stipulations and all proceedings herein be forthwith transmitted to the United States Circuit Court of Appeals.

It is further ordered that the bond on appeal be fixed at the sum of fifteen hundred dollars the same to act as a supersedeas bond and also a bond for costs and damages on appeal.

Helena, Montana.

HIRAM KNOWLES,
District Judge.

Filed and entered Jan. 9, 1901. Geo. W. Sproule, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

CORNELIUS J. McNAMARA and THOMAS A. MARLOW, Copartners Under the Firm Name and Style of McNamara and Marlow,

Plaintiffs,

vs.

HOME LAND AND CATTLE COMPANY and THE NATIONAL BANK OF COMMERCE.

Defendants.

Bond on Appeal.

Know all men by these presents, that we, The Home Land and Cattle Company, a corporation, and the National Bank of Commerce, of St. Louis, Missouri, a corporation, as principals, and Henry Klein and George L. Ramsey as sureties, are held and firmly bound unto Cornelius J. McNamara and Thomas A. Marlow, copartners doing business under the firm name and style of McNamara & Marlow, in the full and just sum of fifteen hundred dollars, to be paid to the said Cornelius J. McNamara and Thomas A. Marlow, copartners doing business as McNamara & Marlow, their attorneys, executors, administrators or assigns, for which payment, well and

truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally, firmly by these presents.

Sealed with our seals and dated this 9th day of January, in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a session of the Circuit Court of the United States for the District of Montana, in a suit pending in said court between the said Cornelius J. McNamara and Thomas A. Marlow, copartners as McNamara & Marlow, complainants, and The Home Land and Cattle Company, a corporation, and the National Bank of Commerce of St. Louis, Missouri, a corporation, respondents, a decree was entered against the said Home Land and Cattle Company and the said National Bank of Commerce of St. Louis, Missouri, and the said Home Land and Cattle Company and the said National Bank of Commerce of St. Louis, Missouri, having obtained from said court an order allowing an appeal to the United States Circuit Court of Appeals to reverse the decree in the aforesaid suit, and a citation directed to the said Cornelius J. McNamara and Thomas A. Marlow, copartners as McNamara & Marlow, is about to be issued, citing and admonishing them to be and appear at the said United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco.

Now, the condition of the above obligation is such that if the said Home Land and Cattle Company and the said National Bank of Commerce of St. Louis, Missouri, shall prosecute their said appeal to effect, and shall answer

all damages and costs that may be awarded against them if they fail to make good their plea, then the above obligation is to be void; otherwise, to remain in full force and virtue.

THE HOME LAND & CATTLE COMPANY, and
THE NATIONAL BANK OF COMMERCE of St. Louis, Missouri.

By CULLEN, DAY & CULLEN,
Their Attorneys.

HENRY KLEIN.
GEORGE L. RAMSEY.

State of Montana,
County of Lewis & Clarke. } ss.

Henry Klein and George L. Ramsey, the sureties to the foregoing undertaking, being each first duly sworn, says, each for himself and not one for the other, that he is a resident and freeholder in the District of Montana, and is worth the amount specified in the said undertaking as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

HENRY KLEIN.
GEORGE L. RAMSEY.

Subscribed and sworn to before me this 9th day of January, A. D., 1901.

R. A. FRASER,
Notary Public in and for Lewis and Clarke County, Montana.

The within undertaking on appeal is hereby approved.
Jan. 9, 1901.

HIRAM KNOWLES,
Judge.

Filed and entered Jan. 9, 1901. Geo. W. Sproule, Clerk.

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States to Cornelius J. McNamara and Thomas A. Marlow, Copartners Under the Firm Name and Style of McNamara & Marlow, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, State of California, within thirty days from the date of this writ, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States for the District of Montana, wherein you are plaintiffs and The Home Land and Cattle Company, a corporation, and the National Bank of Commerce, a corporation, are defendants and appellants, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable HIRAM KNOWLES, Judge of the District Court for the District of Montana, presid-

ing in the Circuit Court, this 9th day of January A. D. 1901.

HIRAM KNOWLES,
District Judge.

Attest:

[Seal] GEORGE W. SPROULE,
Clerk.

Service of the within citation and receipt of a copy thereof admitted this 9th day of January, A. D. 1901.

H. G. McINTIRE,
Solicitor for C. J. McNamara et al., Appellees.

Filed and entered Jan. 9, 1901. Geo W. Sproule, Clerk.

Clerk's Certificate to Transcript.

District of Montana,
United States of America, } ss.

I, George W. Sproule, Clerk of the United States Circuit Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of five hundred and eighty-one pages, numbered consecutively from one to five hundred and eighty-one, is a true and correct transcript of the pleadings, process, orders, testimony taken, report of master, opinion, decree and all proceedings had in said

cause and of the whole thereof, as appear from the original records and files of said court in my possession; and that I have annexed to said transcript and included within said paging the original citation issued in said cause.

I further certify that the cost of the transcript of record amounts to the sum of $183.10 and has been paid by the appellants.

In witness whereof, I have hereunto set my hand and affixed the seal of said United States Circuit Court for the District of Montana, at Helena, Montana, this 2d day of February, A. D. 1901.

[Seal] GEO. W. SPROULE,
Clerk.

[Endorsed]: No. 683. In the United States Circuit Court of Appeals for the Ninth Circuit. Home Land and Cattle Company (a Corporation), and The National Bank of Commerce (a Corporation), Appellants, vs. Cornelius J. McNamara and Thomas A. Marlow, Copartners Under the Firm Name and Style of McNamara and Marlow, Appellees. Transcript of Record. Appeal from the Circuit Court of the United States for the District of Montana.

Filed February 7, 1901.

F. D. MONCKTON,
Clerk.

NO. 683.

IN THE

United States Circuit Court of Appeals.

FOR THE NINTH CIRCUIT.

HOME LAND & CATTLE COMPANY, a Corporation, and the NATIONAL BANK OF COMMERCE, a Corporation,

Appellants.

vs.

CORNELIUS J. McNAMARA and THOMAS A. MARLOW, Co-partners under the firm name and style of McNAMARA & MARLOW.

Appellees.

BRIEF OF APPELLANTS.

W. E. CULLEN,
E. C. DAY,
W. E. CULLEN, JR.,
Solicitors for Appellants.

Appeal from the Circuit Court of the United States for the District of Montana.

NO. 683.

IN THE

United States Circuit Court of Appeals.

FOR THE NINTH CIRCUIT.

HOME LAND & CATTLE COMPANY, a Corporation, and the NATIONAL BANK OF COMMERCE, a Corporation,

Appellants.

vs.

CORNELIUS J. McNAMARA and THOMAS A. MARLOW, Co-partners under the firm name and style of McNAMARA & MARLOW.

Appellees.

BRIEF OF APPELLANTS.

This is a suit in equity commenced originally in the District Court of the Tenth Judicial District of the State of Montana in and for the County of Valley, and removed on petition of defendants to the Circuit Court of the United States for the Ninth Circuit, District of Montana, and was commenced by Cornelius J. McNamara, and Thomas A. Marlow, co-partners under the firm name and style of McNamara & Marlow, citizens of the State of Montana, against the Home Land and Cattle Company, a corporation organized under the laws of the State of Missouri,

and the National Bank of Commerce, a national banking association, whose principal place of business is at St. Louis, in the State of Missouri, to compel the specific performance of a contract for the sale of cattle by the delivery to the complainants of 457 head of stock cattle which were taken into possession by a receiver appointed by the State Court upon the filing of the original complaint. The contract of which specific performance is sought is as follows (Record p. 12):

"This agreement made and entered into on this 27th day of May, A. D. 1897, at Chicago, County of Cook and State of Illinois, by and between The Home Land & Cattle Company, a corporation existing under the laws of the State of Missouri, by its president, Wm. F. Niedringhaus (hereinafter called the party of the first part) and McNamara & Marlow, of Big Sandy, Montana, (hereinafter called the parties of the second part) witnesseth: That said party of the first part for and in consideration of the sum of one dollar and other valuable considerations, hereby agrees to sell to said second parties all of their herd of stock cattle including steers—said herd consisting of thirty thousand (30,000) head more or less, now ranging upon the ranges in Valley, Dawson and Custer Counties, Montana, and being branded as follows to-wit: "Z" on right hip, "N-N" on left hip and side and any other brands owned by said first party. The terms and conditions of said agreement to sell are as follows:

First: Said cattle are to be gathered by said first party and counted out to said second parties at the stockyards, at Nashua or Oswego, Montana, on line of Great Northern Railway during the regular roundup season of 1897, no cattle to be tendered or accepted later than November

1st, 1897; all stock cattle in said herd to be accepted by said second parties whenever tendered (prior to November 1st, 1897) in not less than train load lots; all steers from three year old and up and all spayed heifers and dry cows to be delivered and counted at same points, when marketable for beef in the opinion of said parties of the second part.

Second: All calves of the season of 1897, to be delivered without count or charge to said second parties, whether branded or unbranded..

Third: No lumpy-jawed cattle to be counted in deliveries.

Fourth: Should the two parties to this contract at the close of deliveries for 1897, fail to agree upon a price at which said second parties shall purchase the brands owned by said first party, together with all cattle bearing the same, said first party agrees, during the roundup season of 1898 (prior to November 1st, 1898) to again gather all of the remainder of said herd that it can find with diligent work and deliver the same to said parties of the second part at the same places and in the same manner and at the same price as provided for the season of 1897.

Fifth: The price to be paid by said parties of the second part for said cattle is the sum of twenty-five dollars ($25.00) per head for each and every head delivered as above provided; payable upon the delivery of said cattle.

Sixth: Said first party hereby acknowledges the receipt of the sum of fifty thousand dollars ($50,000) as a first payment of said cattle, which sum is to be deducted, $25,000.00 from the first deliveries made under this contract and $25,000.00 from deliveries not later than September 15th, 1897.

Seventh: Said second parties bind themselves to ac-

cept and pay for said cattle at the price stated when the same are tendered to them under the terms of this contract.

Eighth: Said first party hereby agrees to deposit with Messrs. Rosenbaum Bros. & Co., of Chicago, Ill., the written and acknowledged consent to this sale of all parties holding liens or mortgages of any kind against the cattle or property embraced in this contract upon the payment of fifty thousand dollars ($50,000) stated as the first payment above.

Ninth: Said first party hereby guarantees to deliver to said second parties during the season of 1897, not less than nine thousand head (9,000) of steers of the ages of three year old and up, and spayed heifers of the ages of four years and up; should they fail so to do they hereby agree to pay to said second parties the sum of twenty dollars ($20.00) in cash for each and every head less than nine thousand (9,000) head of such cattle so delivered.

Tenth: At the end of the roundup season of 1897 the parties of the second part agree to purchase of the party of the first part 500 head of saddle and work horses, at the price of twenty dollars ($20.00) per head. Said horses to be selected by parties of second part from entire herd of seven hundred head of party of first part and to be serviceable and sound horses. Work and saddle horses to be selected in proportion. This agreement to be binding upon the heirs, successors and assigns of both the parties hereto.

Witness our hands and seals that 27th day of May, A. D. 1897.

HOME LAND & CATTLE CO.,

(Seal) By Wm. F. Niedringhaus,

President.

(Seal) McNAMARA & MARLOW.

Witness:

Charles Haas,

Geo. W. Niedringhaus."

This contract had been assigned by the Home Land & Cattle Company to the National Bank of Commerce to secure to said bank payment of the indebtedness of the said Home Land & Cattle Company to it (Record p. 16.) The complaint among other things, alleged that the delivery of the cattle under the said contract began in July, 1897, and that on and prior to October 21st, 1897, there had been delivered and received under the said contract upwards of sixteen thousand (16,000) head of cattle of different ages and classes; that prior to October 18th, 1897, the defendant Company had notified the complainants that a final delivery under the said contract would take place on October 18th, 1897, at Oswego, Montana, which would consist of 820 head of steers, 631 head of stock cattle and the 500 head of horses, and that then and thereby it became known to the complainants that there would be short, after the completion of the said delivery, of said steers of three years old and upward 1,932 head; that at the said time and place of said last delivery there was delivered all of said 820 head of steers and all of said stock cattle save 457 head thereof and the said horses, and that the said defendants refused to deliver the said 457 head of stock cattle and horses until the defendant Bank was paid therefor in full at the contract price; that the complainants offered to pay for the said cattle and horses provided the said defendant would at the same

time pay for the steer shortage, and demanded payment of said amount, offering in return to pay the difference between the amount due on the cattle and horses delivered and remaining to be delivered and the amount due on account of said shortage, but defendants refused to make any further deliveries until the complainants had paid the whole of the contract price. The amended complaint also contained allegations of the use to which said cattle were to be put, by reason of which it was claimed that they possessed a special and peculiar value, which could not be adequately compensated for in money damages and that the defendant, the Home Land & Cattle Company was insolvent, by reason of which facts it was averred that the complainants could only be relieved in equity by a specific performance of the said contract as to the delivery of the said 457 head of cattle.

The defendants filed their joint answer (Record p. 18) admitting the allegations of the bill as to the execution of the contract, its assignment and the delivery of sixteen thousand head of cattle, but denying specifically the allegations as to the breach of contract on their part and averring that the complainants had committed a breach of the contract by the failure to make payment for deliveries of cattle which had been made on the 21st day of October, 1897, and that by reason of said falure said defendant had refused to make further deliveries unless the complainants first complied with the contract on their part. The answer further denied the equities of the bill with reference to insolvency and that the cattle had a

special or peculiar value which could not be adequately compensated for in money damages.

After issue joined by replication the matter was, by order of the court, (Record p. 27) referred to the Master in Chancery to hear the testimony and report the same to the court, together with his conclusions of fact and law therein. Testimony was offered before the Master both oral and by deposition, (Record pp. 62 to 614) and after the matter had been fully presented to him, he returned into court his findings of fact and conclusions of law (Record pp. 30 to 37), which are in words and figures as follows:

FINDINGS OF FACT.

1. That at all the times in the pleadings and these findings mentioned, Cornelius J. McNamara and Thomas A. Marlow were and are co-partners under the firm name and style of McNamara & Marlow, and citizens and residents of the State of Montana.

2. That at all the times in the pleadings and these findings mentioned, the defendant, the Home Land & Cattle Company was and is a corporation duly incorporated under the laws of the State of Missouri, and a citizen and resident of said State of Missouri, with its principal place of business in the City of St. Louis in the State of Missouri.

3. That at all the times in the pleadings and these findings mentioned, the National Bank of Commerce was and is a national banking corporation, duly incorporated under the acts of Congress of the United States of America, relating to the organization of National Banks, and a citizen and resident of said State of Missouri, with its

principal place of business in said City of St. Louis.

4. That upon the 27th day of May, 1897, at the City of Chicago, in the State of Illinois, the plaintiffs, Cornelius J. McNamara and Thomas A. Marlow and the defendant, the Home Land & Cattle Company, executed and entered into a certain contract in writing. Said contract is marked Exhibit A and made a part of these findings.

5. That upon the 28th day of May, 1897, the defendant, The HomeLand & Cattle Company, by a certain instrument in writing, sold, assigned, transferred and set over all its right, title and interest in and to said contract specified in the fourth finding. Said assignment is marked Exhibit B and annexed to the amended bill of complaint herein, and made a part of these findings.

6. That deliveries of cattle by the defendant, The Home Land & Cattle Company to the plaintiffs under said contract Exhibit "A" commenced upon the 11th day of July, 1897, and continued from time to time until the 22nd day of October, 1897, inclusive; and that no other deliveries of said cattle under said contract have been made by said defendants, or either of them.

7. That during the year 1897, there were delivered to and received by the said plaintiffs from the defendant, The Home Land & Cattle Company, sixteen thousand cattle of different ages and classes.

8. That during the year 1897, the plaintiffs received under said contract Exhibit A, through the Board of Stock Commissioners of the State of Montana, the proceeds of the sales of one hundred and forty-eight strays belonging to the defendant, The Home Land & Cattle Company.

9. That the plaintiffs have received under said contract Exhibit A, from the defendant, The Home Land &

Cattle Company, 7,135 steers of the ages of three years and up, and spayed heifers of the ages of four years and up of the nine thousand steers and heifers specified in the ninth clause of the terms and conditions of the said Exhibit A; and that 1,865 of said steers and heifers have not been delivered to the plaintiffs under said contract by said defendants, or either of them.

10. That upon the 18th day of October, 1897, the defendant, The Home Land & Cattle Company notified the plaintiffs by a telegram that it would deliver to them upon the 21st inst., at Oswego in the State of Montana, 820 steers, 631 stock cattle and 500 head of horses. Reference is hereby made to Exhibit C, and made a part hereof.

11. That the defendant, The Home Land & Cattle Company, upon the 21st and 22nd days of October, 1897, delivered to the plaintiffs 933 head, consisting of 820 steers and some stock cattle of the value of the sum of twenty-three thousand three hundred and twenty-five dollars ($23,325.00); that the defendant, The Home Land & Cattle Company, was then prepared to deliver to the plaintiffs under the said contract Exhibit A, 457 head of stock cattle and 500 head of horses, but refused so to deliver the same or any part thereof, unless the plaintiffs first delivered to said defendants a draft for said sum of $23,325.00 in payment of said 933 head; that plaintiffs then refused to deliver to said defendants or either of them, a draft for said sum, or any other sum, but offered to pay for said cattle and horses upon their delivery, provided that said defendants, or either of them would pay to the plaintiffs the amount due for shortage in the number of said steers and spayed heifers under said contract at the specified price of twenty dollars per head; that the

plaintiffs then presented to the defendants a statement of the accounts between the said parties, including said claim of shortage, and tendered to the defendants the sum of nine thousand six hundred and seventy-five dollars ($9,675.00) in full payment of said 933 head, and said 457 stock cattle and said 500 horses, and 113 strays, to-wit:

933 head at $25.00	$23,325
457 head at $25.00	11,425
113 head strays at $25.00	2,825
500 head horses at $20.00	10,000
Total	$47,575
Shortage 1,895 head at $20.00	37,900
Balance due defendants	$9,675

and that the defendants refused to accept said tender of said sum of $9,675.00 or settle said claims of the plaintiffs on account of said shortage, and refused to deliver to the plaintiffs the said horses, or said herd of said 457 head of stock cattle.

12. That the defendant, The Home Land & Cattle Company finished its roundup for the season of 1897, upon the 22nd day of October, 1897, and had not made any preparations for, and did not intend to make any further deliveries under the said contract Exhibit A, on or before the first day of November, 1897.

13. That the defendant, The Home Land & Cattle Company, did not have upon its range in said State of Montana, on the 22nd day of October, 1897, any number exceeding 300 head of said steers of the ages of three years and up, and spayed heifers of the ages of four years and up, and that the plaintiffs then knew that the

defendant, The Home Land & Cattle Company, could not deliver said 9,000 head of steers and heifers specified in said contract Exhibit A, and claimed that the shortage therein would be 1,895 head.

14. That the plaintiffs upon the 30th day of May, 1898, notified the defendant, The Home Land & Cattle Company, that they were prepared to receive the remainder of the cattle called for by said contract Exhibit A. Reference is hereby made to Exhibit E, made a part hereof. And that the defendant, The Home Land & Cattle Company, upon the ninth day of June, 1898, notified the plaintiffs that no further deliveries would be made. Reference is hereby made to Exhibit F, made a part hereof.

15. That in the year 1898, the defendant, The Home Land & Cattle Company rounded up and gathered in the State of Montana, 510 cattle of the brands mentioned in the complaint, classified as follows: 232 steers, 165 cows, 42 bulls, 4 heifers and 67 calves; that the same were shipped to the City of Chicago aforesaid; and the defendant, The Home Land & Cattle Company was paid therefor the sum of fifteen thousand two hundred and fifty-six dollars ($15,256.00.)

16. That there was a fluctuation in the value of cattle during the gathering season of 1897 and 1898, and there was an increase in the value of cattle of five dollars per head during the gathering season of 1897, and seven dollars per head during the gathering season of 1898.

17. That the plaintiffs depended upon the deliveries of the cattle mentioned in said contract Exhibit "A" to furnish cattle under beef contracts to the Government Indian reservations.

18. That he plaintiffs had prepared and made food provisions to winter at their ranches in Northern Mon-

tana, a quantity of cows, young steers and heifer stock to fill contracts, and depended upon the cattle described in said contract Exhibit "A" to fill the same.

19. That the defendant, The Home Land & Cattle Company, upon the 22nd day of October, 1897, was indebted to the defendant the National Bank of Commerce in the sum of twenty-five thousand dollars, upon certain promissory notes which had been renewed from time to time; that the amount of this indebtedness on the sixth day of April, 1899, was thirty-five thousand dollars; that the St. Louis Stamping Company, a corporation organized and existing under the laws of the State of Missouri was indebted to the defendant, The Home Land & Cattle Company, upon the 21st day of October, 1897, in the sum of $633,266.73; that the amount of this indebtedness upon March 21st, 1899 was $622,568.73; that the assets of the St. Louis Stamping Company upon the tenth day of April 1899, were $4,135,127.57, and the liabilities were $1,946,-901.57; that the defendant, The Home Land & Cattle Company, was during the times in the pleadings and these findings mentioned, and is now, a solvent corporation.

20. That the defendant, The Home Land and Cattle Company, is not indebted in any sum, except the said sum of thirty-five thousand dollars specified in the nineteenth finding, and such sum as may be due to the plaintiffs by reason of the liabilities arising out of the said contract Exhibit A.

21. That the plaintiffs made all payments to the defendants at the times when the same became due and payable under the terms and conditions of said contract Exhibit "A."

22. That the defendant, The Home Land & Cattle

Company, refused to deliver to the plaintiffs upon the 22nd day of October, 1897, the 457 head of cattle and five hundred head of horses.

23. That the defendant, The Home Land & Cattle Company, refused to make further deliveries to the plaintiffs under said contract Exhibit A, during the gathering season of 1898.

24. That the amount and property involved in this action exceeds the sum and value of two thousand dollars, exclusive of interest and costs.

25. That said 457 head of stock cattle consisted of 270 cows and heifers; one stag, thirty-three bulls and fifty two-year-old steers; 45 one-year-old steers, 27 two-year-old heifers and thirty-one one-year-old heifers; that the same were branded on th right hip; that the same were turned over by The Home Land & Cattle Company to and received by the Receiver appointed by the State Court under its order, in an action instituted in said court, and that the said Receiver thereafter sold and delivered the same to plaintiffs.

CONCLUSIONS OF LAW.

First:—That the plaintiffs have performed or been ready and willing at all times to perform, all the terms and conditions of said contract Exhibit A, on their part to be performed.

Second:—That the defendant, The Home Land & Cattle Company, has not performed the terms and conditions of said contract Exhibit A, upon its part to be performed.

Third:—The paragraph marked ninth of the terms and conditions of said contract Exhibit A, is a material part thereof, and plaintiffs relied upon the guaranty and agreement therein contained.

Dated this fourteenth day of September, 1899.

HENRY N. BLAKE,

Master in Chancery.

To these findings the defendants filed exceptions (Record pp. 38 to 41), which said exceptions are in words and figures as follows:

DEFENDANT'S EXCEPTION TO MASTER'S REPORT

"Come now the defendants, The Home Land & Cattle Company and the National Bank of Commerce of St. Louis and except to the findings of fact and conclusions of law filed herein by Henry N. Blake, Master in Chancery, in the following particulars, to-wit:

I.

Defendants except to finding No. nine, for the reason that the evidence does not justify said finding in this, that the evidence shows that 7,020 head of steers and heifers had been delivered to the plaintiffs, and that they had received the proceeds of 148 strays making a total of 7,168 received by the plaintiffs and leaving only 1,832 head of said cattle not delivered. (See Plaintiff's Exhibit "G" and defendants' deposition of A. Niedringhaus, pp. 2 and 3 and findings No. 8.)

II.

Defendant's except to the 12th finding of fact for the reason that the evidence does not justify the said finding in this: That the only evidence as to the intent of the defendants with reference to further deliveries is the testimony of the witnesses Blackman, Sharp and Albert Niedringhaus, each of whom testified that it was their intent to deliver such other cattle as they were able to obtain prior to the first day of November.

Defendants' depositions pp. 72, 84, 105, 108, 152.

Defendants except to the said 12th finding on the further ground that the same is immaterial and irrelevant in this, that after the refusal of the plaintiffs to make the payments as found in No. 11, the defendants were under no obligations to make deliveries under the said contract.

III.

Defendants except to findings numbered 14, 15, 17 and 18 on the ground that the same are immaterial.

IV.

The defendants except to finding No. 21 for the reason, first, that he same is a conclusion of law, rather than a finding of fact, the duty of the plaintiffs to make the payments depending upon the construction of the contract, Exhibit "A" which said construction is a question of law for the court; and second, the said finding, if it may be considered a finding of fact, is not supported by the evidence and is in conflict with finding No. 11, which is supported by the testimony of all of the witnesses in the case who testified in regard to the payments.

V.

The defendants except to finding No. 22 for the reason that the same omits the conditions attached to the refusal of the defendants to deliver the cattle therein mentioned and is therefore incomplete.

VI.

The defendants except to finding No. 23, for the reason that the same is immaterial.

VII.

The defendants except to the conclusions of law numbered First and Second, for the reason that the same are not supported by the findings of fact and are against the law in this: That the contract, Exhibit "A," required the plaintiffs to make payments as the deliveries were

made and the finding of fact No. 11 shows that the plaintiffs refused to pay for cattle which had been already delivered, and that it was not until after this refusal to pay that the defendant refused to continue performance of the contract, and under the facts found the defendants were entitled to refuse to continue to perform the terms of the said contract until the plaintiffs had made payment for the cattle already delivered. It further appears from finding No. 11 and the evidence that the plaintiffs' offer to perform was not in compliance with the contract, or according to law, in that the plaintiffs had no right to an adjustment of the shortage of cattle to be delivered under clause Nine of the contract, until the expiration of the time in which deliveries might be made, and they could then only ask for an adjustment for the actual shortage, in this case 1,832 head, the damage to be computed on the basis of the difference between the market value of the cattle and the price agred to be paid, which in this case was found to be $5.00 per head (Finding No. 16.) For which reason the tender of performance on the part of the plaintiffs, as found in Finding No. 11, was not complete in law and did not place the defendants at fault. And the defendants were entitled to stand upon their demand of payment for cattle delivered, and the Master should have so found.

VIII.

The defendants except to the third conclusion of law, for the reason that the same is immaterial."

The matter coming on to be heard before the court upon the said exceptions, after argument the court overruled the exceptions of the defendants, upon the ground that the exceptions should have been presented to the

Master (Opinion, Record pp. 50 to 52) and confirmed the Master's report, and ordered a decree in favor of the complainants according to the prayer of the complaint (Record pp. 47 to 49.) From this decree made and entered on the 14th day of December, 1900, defendants have appealed to this court, assigning the following errors:

ASSIGNMENTS OF ERROR.

Come now The Home Land & Cattle Company and the National Bank of Commerce of St. Louis, Missouri, by their solicitors and counsel, and say that in the decree of the court herein made and entered on the 14th day of December, A. D. 1900, and in the records and proceedings therein, there is manifest error in this, to-wit:

I.

That the court erred in over-ruling the exceptions of the defendants to the report of the Master, on the ground that such exceptions had not been presented to the Master, for the reason that the said exceptions were exceptions drawn and filed in the said court under and in accordance with the provisions of Equity Rule No. 83, and were exceptions to the rulings made by the Master upon matters which had been fully presented to him.

II.

The court erred in over-ruling defendants' Exception No. 2, upon the ground that the consideration of the same would require it to review all of the evidence in the case, for the reason that the said exception was drawn under and in accordance with the provisions of Equity Rule No. 83, and specifically pointed out the particular evidence relied upon to support the exception.

III.

The court erred in refusing to consider the defendants' Exceptions Nos. 3 and 6, for the reason that the findings therein mentioned were immaterial to the consideration of this cause.

IV.

The court erred in refusing to consider the defendants' Exception No. 4, for the reason that the said exception was taken to a finding purporting to be a finding of fact, whereas the same was a conclusion of law.

V.

The court erred in refusing to consider the defendants' Exception No. 5 to Finding No. 22, for the reason that the said finding reported by the Master was incomplete and the court was not bound thereby.

VI.

The court erred in refusing to consider the defendants' Exception No. 7, being exception to the conclusions of law of the Master's Nos. 1 and 2, for the reason that the said conclusions were not supported by the Findings of Fact and were against the law, and the court was not bound by the conclusions of law of the Master, although no objection had been taken to them before him.

VII.

The court erred in refusing to consider the defendants' Exception No. 8, being an exception to the Master's conclusion of law No. 3, and in holding that the conclusion of law as found by the Master was correct, for the reason that the said conclusion of law so found by the Master

was immaterial to any of the issues in the said cause as made by the pleadings.

VIII.

That the court erred in refusing to consider the defendants' Exceptions to Finding No. 17, and in adopting the Findings of the Master as therein stated, for the reason that the same was immaterial to any of the issues in the cause.

IX.

The court erred in holding that the contract sued on was not what is termed a severable contract, for the reason that by the express terms of the contract, payment for the cattle was to be made upon the delivery thereof in train load lots, and it does not appear from the finding that the plaintiffs refused to pay for the cattle on the ground that such delivery was not made in train load lots, and therefore under and by virtue of the terms of the contract, payment for deliveries made became a necessary condition precedent to any further demand for deliveries.

X.

The court erred in holding that The Home Land & Cattle Company did not demand a rescission of the contract on the ground or on account of the failure to make payment for cattle delivered, for the reason that it was not necessary that the said Company should do more than demand payment for such deliveries before proceeding with other deliveries, and to refuse to make further deliveries until payment was received.

XI.

The court erred in holding that the plaintiffs were not required to pay the amount due for the cattle delivered as found by the Master, before demanding other deliveries, for the reason that by the terms of the contract the plaintiffs expressly agreed to pay for such cattle when delivered in train load lots, and it appears from the findings of the Master that train load lots of cattle had been delivered for which payment had not been made at the time that the defendants demanded the draft for the sum of twenty-three thousand three hundred twenty-five dollars ($23,325.00), as set forth by the Master in Finding No. 11.

XII.

The court erred in finding that The Home Land & Cattle Company was insolvent so far as the jurisdiction of Montana is concerned and that for that reason the plaintiffs' remedy at law would be inadequate, for the reason that the Master found and the Court has adopted the finding that The Home Land & Cattle Company was solvent, and the fact that such solvency did not exist in the State of Montana, was not of itself sufficient equity to give the court jurisdiction to decree specific performance of the contract for the sale of personal property.

XIII.

That the court erred in holding that it had jurisdiction to enforce specifically the performance of the contract in suit, and in holding and adjudging the specific performance of the said contract, for the reason that the said contract was one for the sale and delivery of goods and chat-

tels, and there was not shown any reason why an action for damages upon the said contract would not be an adequate remedy for the breach thereof, if any breach occurred.

XIV.

That the court erred in finding that The Home Land & Cattle Company and the National Bank of Commerce had failed to perform the said contract, so far as the same was required to be performed by them, for the reason that it appeared from the said contract and the Findings of Fact as reported by the Master that a delivery of cattle had been made to plaintiffs for which plaintiffs had refused payment and therefore said defendants were excused from any further performance of the said contract.

XV.

That the court erred in adopting the finding of the Master No. 11, in so far as the said finding established the balance due the defendants for the alleged shortage of cattle, and in so far as it finds that the plaintiffs tendered to the defendant the amount due under the said contract for cattle delivered, in this, that it appears from the said finding that the said shortage was based upon an estimate of twenty dollars per head for the amount of steers and spayed heifers, not delivered, less than 9,000, and for the reason that clause Nine of the contract in suit, which provided for the payment of the sum of twenty dollars per head for each and every head less than 9,000 not delivered, was an attempt to provide stipulated damages for the breach of said contract and was, under the laws in force in the State of Montana, where the said contract was to

be performed, at the time it was to be performed, null and void, and the plaintiffs were not entitled to any amount for steer shortage other than the difference between the market value of the value of cattle at the time the said contract was to be performed and the contract price as specified in the said contract.

XVI.

The court erred in adopting the Master's first conclusion of law to the effect that the plaintiffs had performed or been ready and willing at all times to perform all the terms and conditions of the contract in suit on their part to be performed, for the reason that it appears from Finding No. 11, that the delivery of cattle, amounting to 933 head, had been made to the plaintiffs, for which payment thereof had not been made to the defendants, and the tender claimed to have been made by the plaintiffs to the defendants of the sum of nine thousand six hundred and seventy-five dollars ($9,675.00) was not a tender of the amount due the said defendants for the said cattle so delivered to them; nor was it a tender of the amount due the defendants after allowing for the claim of shortage under the ninth clause of the said contract, for the reason that the stipulations of the ninth clause as to the allowance of twenty dollars per head for cattle less than the nine thousand specified therein, was, under the law in force in the State of Montana, where the said contract was to be performed, at the time it was to be performed, null and void, and the only amount which the plaintiffs were entitled to deduct for said shortage, if any, was the difference between the market value

of the cattle at the time the said contract was to be performed and the contract price specified, which, by Finding No. 16, was the sum of five dollars per head.

XVII.

That the court erred in adopting the second conclusion of law of the Master, to the effect that the defendant, The Home Land & Cattle Company had not performed the terms and conditions of the said contract upon its part to be performed, for the reason that by the Master's Finding of Fact No. 11, it appears that the defendants were ready and willing to deliver the 457 head of stock cattle referred to in said finding upon compliance with the terms of the contract by the plaintiffs, and it further appears from the said finding that the plaintiffs did not perform or tender performance of the terms of said contract to be performed by them.

XVIII.

That the court erred in decreeing the specific performance of the contract in suit, by the delivery to the plaintiff of the 457 head of stock cattle described in the complaint, for the reason that the court had no jurisdiction to specifically enforce the performance of a contract for the sale of personal property.

XIX.

That the court erred in decreeing the specific performance of the contract in suit by the delivery to the plaintiffs of the 457 head of stock cattle described in said decree, for the reason that the plaintiffs have not paid or tendered to the defendants the amount to be paid for the cattle, as in the said contract provided, nor have they per-

formed the terms and conditions of said contract to be performed by them.

XX.

That the court erred in entering its said decree in favor of the plaintiffs and against these defendants, and in not holding that it had no jurisdiction to specifically enforce the contract sued on, and in not ordering the said suit to be dismissed at the cost of the plaintiffs.

ARGUMENT.

I.

EXCEPTIONS TO MASTER'S REPORT.

The first assignment of error is to the effect that the court erred in overruling the exceptions of defendants to the report of the Master, on the ground that such exceptions had not been presented to the Master.

The basis of the court's ruling is shown by the following extract from the opinion (Record p. 52.)

"The exception of the parties to the report or any part thereof should have been first submitted to the Master for his consideration and action, so that he might know in what particular his report was objectionable, and to enable him to correct his errors and reconsider his opinion.

I think this matter of the consideration of these exceptions by the Court, in the first instance, comes fully and fairly within the rule and the principles laid down in the following cases: *Story vs. Livingston, 13 Peters, 359; Kimberley vs. Arms, 129 U. S. 524; Sheffield, etc. R. Co. vs. Gordon, 151 U. S. 290; Gay Mfg. Co. vs. Camp, 68 Fed. 68,* and a large number of cases cited therein."

An examination of the cases cited by the court discloses that the principles laid down in those cases can have no application to the exceptions in the case at bar.

In Story vs. Livingston, *supra*, Mr. Justice Wayne opens the discussion of the question of exceptions to the Master's report by saying:

"All of these exceptions except the third are irregularly taken and might be disposed of by us without any examination of them in connection with the Master's report. They are too general; indicate nothing but dissatisfaction with the entire report and furnish no specific ground, as they might have done, wherein the defendant has suffered any wrong, or as to which of his rights have been disregarded."

The third exception referred to was that the Master's report did not show that it contained all the evidence taken before the Master, and after laying down the rule which the learned Judge said accorded with chancery practice that objections must be taken before the Master, he continues:

"But without restricting exceptions to this course we must observe that the exceptions to the report of a master must state article by article those parts of the report which are intended to be excepted to."

In Kimberley vs. Arms, *supra*, Mr. Justice Field in opening his opinion says:

"The first question to be considered on the appeal relates to the effect to be given to the findings of fact and of law contained in the report of the Special Master. The court below refused to treat them as presumptively correct, so as to impose upon the excepting party the burden

of showing error in them."

And the court holds that where there has been a reference by consent the findings of the Master are presumptively correct. The question at bar was not in any way involved in the case.

So too in the case of *Sheffield, etc. R. Co. vs. Gordon, supra*, Mr. Justice Brown says:

"There are two difficulties in the way of considering the case upon these exceptions.

(1) The exceptions themselves are too broad and amount simply to a general denial of the facts and conclusions of the Master, * * * In other words they are general denials of the merits of the claim."

And whatever else is said in the opinion about objections being taken before the Master is clearly dicta.

The case of *Gay Manufacturing Company vs. Camp, supra*, was a case in the Fourth Circuit, where, from the opinion, there appears to have existed a rule of practice which Judge Simonton lays down as follows:

"To prevent misapprehension it is best to state that we do not require the conclusions of the Master on matters of law to be first excepted to before him. This is unnecessary. But we do require that matters of fact upon which exceptions to his report are made be brought to his attention in order that he might report them."

And in speaking of the particular points involved in the case he says:

"We cannot discover that the sum claimed as liquidated damages was ever called to his attention, or that he was ever requested to report on it."

It is apparent from this that the only point decided by

Judge Simonton was that the matters objected to must be brought to the attention of the Master; in other words, that the parties could not attend a hearing before the Master and except to his failure to make findings on matters in issue, without first calling those matters in issue to his attention. But the case at bar presents a very different question. The exceptions, waiving those based upon the grounds of immaterity, are exceptions to the findings made by the Master upon *matters* directly in issue, which were brought to his attention and as to which he had found in a specific manner. We contended before the trial court and now contend that the exceptions as to such matters are not within the rule laid down by Judge Simonton, but are governed by the provisions of Equity Rule 83.

Mr. Foster lays down the rule as follows:

"No exception will lie to any matter which was not objected to before the Master. In circuits where it is not the practice for Masters to serve drafts of their reports, an exception to the report, but not an exception to a ruling in evidence, can be filed without a preliminary objection."

Foster's Federal Practice Sec. 315.

The best statement, however, of the rule is that made by Judge Paul in the case of *Fidelity Insurance & Safety Deposit Company vs. Shenandoah Iron Company, 42 Fed. Rep. 372*, which is as follows:

"A third objection urged to the consideration of these exceptions is 'that they were not taken at the proper time; that they should have been filed before the Master had

completed his report, so that if there were errors in the report the Master could have had the opportunity to correct them.' This was formerly the English chancery practice. The Master made a draft of his report, notified counsel of his findings, gave them an opportunity to point out errors, and the Master considered and corrected them. It was also the practice of the federal courts in chancery, prior to the adoption of the equity rules of practice. This was the practice when *Story vs. Livingston, 13 Pet. 359,* was decided. This case has been strenuously urged upon the attention of the court as applicable to the exceptions under consideration. Story vs. Livingston was decided in January, 1839. The rules of equity practice were promulgated by the Supreme Court on March 2, 1842, and since that time the practice has been different from that indicated in Story vs. Livingston. So far from its now being required that exceptions shall be filed before the Master during the time he is making up his report, one month is allowed after the report has been completed and returned to the clerk's office in which to file exceptions thereto. Rule 83 of rules of practice in equity provides:

'The Master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from time of filing the report to file exceptions thereto ;and, if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired.'

This provision leaves no question as to the correctness of the practice pursued in this case. This view is sustained in the opinion of Judge Gresham in *Hatch vs. Railroad Co, 15 Myer, Fed. Dec. 839, 9 Fed. Rep. 856-860.*"

And again in *Jennings vs. Dolan*, *29 Fed. 861*, Judge Wheeler lays down the rule as follows:

"The defendants in both cases except to the finding of the Master that there was an established license fee, and object to a decree for anything beyond a merely nominal sum in the latter case. The Master submitted a draft report to the counsel of the respective parties and defendants' counsel deferred his objections and made no furthed question to the Master. The plaintiffs insist that he thereby waived all ground of exception to the report. But this exception is to a principal finding, upon all the evidence in the case about whcih nothing could be done before the Master except to request him to change his finding. The defendants were under no obligation to make that request after he had announced his conclusion upon that point, but could raise the question before the court as to whether the finding was warranted by the proofs, by filing his exception in court according to the rules of the court."

In *Hatch vs. Indianapolis & Sprinfield R. Co. 9 Fed. 856*, Judge Gresham points out the alterations in the chancery practice introduced by the adoption of equity Rule 83, which in effect are that when the case has been fully argued in the first instance to the master, it is not necessary to make any additional objections to his findings involving the entire case, but the proper practice is to file exceptions to the report and present them to the court, as provided for in Rule 83.

An examination of the exceptions sought to be taken by the defendants in this case, shows that, with the exception of exceptions 3, 6 and 8, which are based upon

the grounds that the Master's findings are immaterial, the remaining exceptions are exceptions to the findings of the Master upon matters which were brought to his attention and as to which the defendants could have made no other request of the Master, except that he change his findings,—a request which, as is said by Judge Wheeler, was unnecessary. Even according to the strict rule laid down by Judge Simonton, exceptions 4 and 7 should have been considered by the court, for the reason that they are exceptions to the Master's conclusions of law.

We therefore respectfully submit that the court erred in holding that he was bound by these findings of the Master, in so far as they were excepted to by the defendant, and that the First Assignment of Errorshould be sustained.

What has been said with reference to the first assignment of error applies also to the Second, Fourth, Fifth, Sixth and Seventh Assignments of Error.

The Third and Eighth Assignments of error, being based upon the ground that the findings of the Master as therein stated related to facts which were immaterial to the consideration of the case, may be passed without any further discussion.

II.

CONSTRUCTION OF CONTRACT.

Passing, however, the question of the right to except to the Master's findings of fact, the court considered the case upon its merits, and reached the conclusion that the contract in suit was not what might be termed a sever-

able contract, and that the appellants had no right to demand payment for the cattle delivered on October 21st, where they had not the ability to comply fully with the terms of the contract, requiring the delivery of 9,000 head of steers and heifers (Rec. p. 58.) In this we think the court erred, and Assignments of Error numbered Nine, Ten, Eleven and Fourteen were designd to present this ruling for review. Together they present the question of the construction of the contract and the rights of the parties thereunder, as determined by the circumstances existing on October 22nd, 1897. The terms of the contract in so far as they affect this question are as follows: (Rec. p. 12.)

"That said party of the first part for and in consideration of the sum of one dollar and other valuable considerations, hereby agrees to sell to said second parties, all of their herd of stock cattle, including steers—said herd consisting of thirty thousand head (30,000) more or less, now ranging upon the ranges in Valley, Dawson and Custer Counties, Montana, and being branded as follows, to-wit: "Z" on right hip, "N-N" on left hip and side and any other brands owned by said first party. The terms and conditions of said agreement to sell are as follows:

First: Said cattle are to be gathered by said first party and counted out to said second parties at the stock yards, at Nashua or Oswego, Montana, on line of Great Northern Railway during the regular roundup season of 1897, no cattle to be tendered or accepted later than November 1st, 1897; all stock cattle in said herd to be accepted by said second parties whenever tendered (prior to November 1st, 1897), in not less than train load lots; all steers from three years old and up, and spayed heifers and dry

cows, to be delivered and counted at same points, when marketable for beef in the opinion of said parties of the second part.

Fifth. The price to be paid by said parties of the second part for said cattle is the sum of twenty-five dollars ($25.00) per head for each and every head delivered as above provided; payable upon the delivery of said cattle.

Seventh. Said second parties hereby bind themselves to accept and pay for said cattle at the price stated when the same are tendered to them under the terms of this contract.

Ninth. Said first party hereby guarantees to deliver to said second parties during the season of 1897 not less than nine thousand (9,000) head of steers of the ages of three years old and up, and spayed heifers of the ages of four years and up; should they fail so to do they hereby agree to pay to said parties the sum of twenty dollars ($20.00) in cash for each and every head less than nine thousand (9,000) head of such cattle so delivered.

Tenth. At the end of the roundup season of 1897 the parties of the second part agree to purchase of party of the first part 500 head of saddle and work horses, at the price of twenty dollars ($20.00) per head. Said horses to be selected by parties of the second part from entire herd of seven hundred head of party of the first part and to be serviceable and sound horses. Work and saddle horses to be selected in proportion. This agreement to be binding upon the heirs, successors and assigns of both the parties thereto."

The Master found with reference to the performance of the contract (Rec. pp. 31. 32, 33): that deliveries of cattle commenced under the contract upon the eleventh day of July, 1897, and continued from time to time until the

22nd day of October, 1897, and that during that period of time 16,000 head of cattle of different ages and classes had been tendered and received; that in addition to these the respondents had received the proceeds of the sale of 148 strays; that 7,135 steers and spayed heifers, of the class described in clause nine had been delivered and that 1,865 of that class had not been delivered; that upon the 18th day of October, 1897, The Home Land & Cattle Company notified respondents by telegram (Rec. 607) that there would be delivered at Oswego, October 21st, 820 steers, 631 stock cattle and 500 head of horses.

That the defendant, The Home Land & Cattle Company upon the 21st and 22nd days of October, 1897, delivered to the plaintiffs 933 head, consisting of 820 steers and some stock cattle of the value of the sum of twenty-three thousand, three hundred and twenty-five dollars ($23,-325.00); that the defendant, The Home Land & Cattle Company was then prepared to deliver to the plaintiffs under the said contract Exhibit "A" 457 head of stock cattle, and 500 head of horses, but refused so to deliver the same or any part thereof, unless the plaintiffs first delivered to said defendants a draft for said sum of $23,-325.00 in payment for said 933 head; that plaintiffs then refused to deliver to the said defendants, or either of them, a draft for said sum, or any other sum, but offered to pay for said cattle and horses upon their delivery provided that said defendants or either of them would pay to the plaintiffs the amount due for the shortage in the number of said steers and spayed heifers under said con-

tract, at the pecified price of $20.00 per head; that the plaintiffs then presented to the defendants a statement of the accounts between the said parties, including said claim of shortage and tendered to the defendants the sum of nine thousand and six hundred and seventy-five dollars ($9,675.00) in full payment of said 933 head, and said 457 stock cattle and said 500 horses and 113 strays to-wit:

933 head at $25.00	$23,325
457 head at $25.00	11,425
113 strays at $25.00	2,825
500 head of horses at $20.00	10,000
Total	$47,575
Shortage 1,995 head at $20.00	37,900
Balance due defendants	$9,675

And that the defendants refused to accept said tender of said sum of $9,675.00 or settle said claims of the plaintiffson account of said shortage, and refused to deliver to the plaintiffs the said horses or said herd of said 457 head of stock cattle.

That the defendant, The Home Land & Cattle Company finished its roundup for the season of 1897, upon the 22nd day of October, 1897, and had not made any preparations for, and did not intend to make any further deliveries under said contract, Exhibit "A," on or before the first day of November, 1897.

That the defendant, The Home Land & Cattle Company did not have upon its range in said State of Montana on the 22nd day of October, 1897, any number exceeding

300 head of said steers of the ages of three years and up and spayed heifers of the ages of four years and up and that the plaintiffs then knew that the defendant, The Home Land & Cattle Company, could not deliver said 9,000 head of steers and heifers specified in said contract, Exhibit "A" and claimed that the shortage therein would be 1,895 head.

There is not much serious controversy in the record as to what took place on October 21st and 22nd at Oswego, although the various witnesses differ as to details. Supplementing the Master's findings, the testimony of all the witnesses concur in these facts: That when Messrs. McNamara and Marlow arrived at Oswego, they found A. W. Niedringhaus, representing the National Bank of Commerce, T. L. Blackman, who was the foreman of The Home Land & Cattle Company and Mr. F. C. Sharp, an attorney of St. Louis. A lot of cattle, consisting of the number mentioned in the telegram, was being herded some distance back of the station. At the request of Messrs. McNamara and Marlow, Mr. Blackman cut out from the herd of cattle, a train load lot consisting of 626 head, which were delivered to respondents, loaded on board the cars and shipped by respondents to Chicago. That was all of which delivery was demanded that day. The next morning at the request of Mr. McNamara a lot of 307 designed for the Poplar River Agency was delivered and received by the respondents. (See the testimony of A. W. Niedringhaus, Rec. 128-131. Blackman, Rec. 160-162; Sharp, Rec. 206-207; Marlow, Rec. 339-340; Mc-

Namara, Rec. 446-449.) We may pass by the conflict of testimony with reference to the conversation about payment for the cattle on October 21st. All agree that after the delivery of these two lots payment for them was demanded and refused, and the remaining facts took place as found by the Master.

Under the terms of the contract we contend that appellants had until the first day of November in which to make deliveries of cattle called for by their contract, and that so long as they were in good faith attempting to make such deliveries the respondents had no right either to an adjustment of damages, or to an action to enforce the contract.

The rule is well laid down in the case of

Daniels vs. Newton, 114 Mass. 530.

"To charge one for damages for breach of an executory personal contract, the other party must show a refusal or neglect to perform *at a time when and under conditions such that he is or might* be entitled to require performance."

And this law of contracts is so clear and so well established, so preliminary and elementary, as not to require discussion or citation of authorities.

The defendants had not contracted to adjust damages under the ninth clause of the contract until November 1st, 1897, and they could not be called upon so to do upon the 22nd day of October, 1897. They had expressly stipulated in their contract that they should have until the 1st day of November to complete their contract and the plaintiffs had no cause of action for any shortage in de-

liveries until that date.

A legal remedy must be founded upon some present legal right and must conform to the nature of that right. Until the plaintiffs had either suffered loss or wrong of that which has already vested in them as of right, *or have been deprived of or prevented from acquiring* that which they were entitled to have or demand, they have no ground on which to seek a remedy by reparation.

Until the first day of November, 1897, there was nothing under the ninth clause of the contract which could be set off by the respondents to the payments due the appellants. Any liability under this clause was contingent and was a matter for future adjustment between the parties, upon a full knowledge of all the facts in the matter and one which could not possibly form, on October 22nd, a present set off upon the payments due the appellants. Until the first of November arrived the penalty provided by the ninth clause was not liquidated, so that the respondents could make such an adjustment of the damages as they attempted. It was not a thing *in esse* but rather *in potesse.* It was not a demand liquidated, existing and in being as of that time, but uncertain in amount, indefinite, merely potential and liable to occur upon the happening of certain events. It falls under the rule of law which provides that a person cannot collect a debt or set off the same until it is due, and that a contingent or prospective claim for damages is not a matter of set off in pleadings. We must consider that the act of the respondents in attempting to make this set off is to be regarded in the same light as if a set off had been plead-

ed in an action. Respondents' adjustment was to be a final winding up of the contract, a complete termination of the rights and liabilities of both parties, without any recourse to law, and that before the time had arrived as provided for by contract.

Respondents alleged and the Master found that prior to October 21st, they had been notified that on that day the "final" delivery of cattle would be made. This allegation is not supported by the evidence. McNamara and Marlow each testify that W. F. Niedringhaus told them about October 1st, that he "expected" to be ready to make delivery on or about October 14th, and that he "expected to have all the cattle in and be through by that time." This conversation did not take place about October 1st, or at the October deliveries, for the reason that W. F. Niedringhaus was in St. Louis at that time. (Rec. 77.) If it took place in September, then it could not be consided as anything more than a mere expression of opinion and not as a final decision or announcement. McNamara says that Blackman told him at Oswego that they were through gathering, but Marlow on cross-examination says that what Blackman said was, "We are through except around the bends of the river and those that have broken away." This agrees with Blackman's recollection of it. Besides this contract had been assigned to the bank and its interest therein recognized by respondents, and respondents had received notice from it of this delivery in which nothing was said about the finality of delivery (Rec. 606-608.) And they were told by Sharp that other deliveries would be made (Rec. 209.) An effort

was made to show that defendants could not have gathered any more cattle and did not intend to so gather, for the reason that their roundup outfits were being discharged. This was all immaterial. Appellants had the right to use such means as they saw fit to make deliveries until the time for such deliveries had expired, and respondents had no right to act upon an anticipatory breach until they had been informed *in unequivocal terms* by appellants that they did not intend proceeding further.

But assuming that the appellants had positively announced that they had no other steers to deliver, the inability to deliver the full nine thousand head of steers was not such a breach of the contract as would justify the respondents in withholding payment for cattle already delivered and at the same time demanding the delivery of other cattle then on hand. It seemed probable to all parties when the contract was drawn that there might be a shortage of steers, and a remedy was provided for any default in performance in that respect by the terms of the Ninth clause. McNamara knew in August that there would be a shortage (Rec. 477) and called upon the National Bank of Commerce and asked if they would make it good, to which Mr. VanBlarcom answered affirmatively. They knew it in September (Rec. 69, 102, 103) and sought to compromise it. If the fact of shortage was a breach, in the absence of the Ninth clause, acceptance of delivery after knowledge of it was an election to waive the breach as a ground of rescission of the contract.

Such is the tenor of all the cases and it is clearly laid down by the Supreme Court of the United States in

McGillin v. Bennett, 132 U. S.445, a case which dealt with a contract whose subject matter was the sale of a herd of cattle and having provisions much like the one under discussion, except that the payments and deliveries were not made in installments. The vendor stipulated to deliver 12,500 head of cattle, but from a severe winter was able to deliver only 7,646 head. On account of the cattle this fact became known to both parties. The vendee elected to accept the cattle and the Supreme Court says:

"He elected to accept what the plaintiff (the vendor) had to deliver, and must be held *to have assented to such re-adjustment of the terms of the contract as was made necessary by the changed facts.*"

Applying this to the case at bar, if the contract had not contained the Ninth clause, respondents, on discovering that the herd did not contain the guaranteed number of steers could have rescinded the contract and held the appellants for damages. This would have been their policy on a falling market. If they elected to accept the cattle then they would be bound to carry out the contract, subject to such re-adjustment as became necessary by the changed facts. What then is the effect of the penalty contained in the Ninth clause?

The contract here is a contract for the sale of a specific herd of cattle, with provisions for deliveries in installments and for payments on receipt of cattle, and containing a guaranty to deliver a specific number of steers, with a penalty attached by the Ninth clause for a failure to deliver that number. At the time of making the contract it was thus foreseen that the herd might be short

of the guaranteed number of steers and the contingency was expressly provided for. In other words, the respondents have by this contract purchased a specific herd of cattle and have obligated themselves to accept and pay for them as delivered, and have provided for themselves, in their contract, a specific remedy accruing at a certain time in the event the herd should not contain the guaranteed number of steers. Such is their contract and they are bound by it. By obtaining from the appellants a specific remedy for this contingency, they have precluded themselves from certain remedies which the law otherwise would give them. That is, when they discovered that the herd of cattle did not contain the guaranteed number of steers, they would have no right to rescind or to refuse performance on this ground. It had been foreseen and guarded against. They were compelled by their contract to accept and pay for the cattle. They must look to the penalty for relief.

Where the contract provides a penalty for the failure to do an act, the failure to do the act is not a breach, it merely liquidates the penalty.

Beach Modern Law of Contracts, Sec. 416.
Ehrlick v. Insurance Co., (Mo.) 15 S. W. 530.
Rugg v. Moore, 1 Atl. R. 320.
O'Connor v. Bridge Co., 27 S. W. 251.
McGoin v. Hen, 6 La. 729.
Spear v. Snider, 13 N. W. 910.
Stillwater v. Temple, 28 Mo., 156.

We do not mean to claim that this is an alternative contract and one which would give appellants the option

to break the contract on paying the damages. But what we do mean to say is, that when appellants have made a bona fide effort to fill the contract, and have failed through no fault of theirs, then the penalty becomes operative, and there is no breach of contract, because the contingency has been foreseen and provided against. Respondents saw fit in their contract to rely on this penalty, if such a contingency arose, and to rely on this alone. If they desired other safeguards and additional protection in making their payments they should have, at the time of entering into the contract, required of appellants a bond for its faithful performance, or they should have inserted in the terms of the contract a provision such as we find in cases like *Evans v. Ry Co., 26 Ill. 189; Miller v. Sullivan,* (*Tex.*) *33 S. W, 695,* in which cases a certain per cent of the amount to be paid on installments delivered was retained by the vendee for his protection for the future performance of the contract. This is quite a common provision in contracts. Respondents saw fit to rely on this penalty alone, which could not mature until November 1st, 1897, and they must be held to this relief alone. It was nowhere provided that if this contingency occurred the respondents would have the right to terminate the contract or to refuse payment for cattle delivered. On the contrary, the contract obligated them in the strongest words that the parties could use, to receive the cattle and pay for them on delivery. This they must do, or they themselves would commit a breach of contract. Respondents' own construction of this Ninth clause, in

exact accordance with the views above set forth, viz: that this clause did not become operative until the time for deliveries had elapsed and that they considered it a matter of future adjustment, after the deliveries were all in and paid for, is shown by McNamara's conversation with Van Blarcom, Cashier of the National Bank of Commerce, held early in August, 1897, at St .Louis, where he had gone for the express purpose (Rec. 477). McNamara asked Van Blarcom if the bank would make the shortage good under the contract, to which Van Blarcom replied that they would live up to the contract.

Assuming, however, that the inability of appellants to deliver the full 9,000 head of steers and heifers, as provided for in the Ninth clause of the contract, was a breach which would entitle the respondents to some relief prior to the first day of November, it is certain that they are not entitled to a specific performance of the contract without showing performance on their part as provided by the contract; nor are they entitled to an adjustment of damages prior to the time fixed by the contract. Respondents have proceedd upon the theory that the appellants had notified them that October 21st was a final delivery and that appellants had repudiated the contract, so far as the intention to make further deliveries was concerned. And this view of the matter is taken by both the court and the Master. We have shown, we think, that there is nothing in the evidence to support the allegation that the appellants had *notified* respondents that the delivery of October 21st was to be a final delivery.

The Master does not in terms find that the appellants had notified respondents that the delivery was to be a "final" delivery, but finds that it was in fact a final delivery, for the reason that they had not made any preparation and did not intend making any further deliveries under the contract.

A recent writer says:

"The use of the word 'repudiation' in the law of contracts is modern and though the conduct to which this name has been applied can hardly have been confined to modern times, still it is chiefly in recent cases that the legal effect of such conduct has been considered; indeed it cannot be said that he courts have even as yet worked out a consistent and logical doctrine on the subject.

By repudiation of a contract is to be understood such words or actions, by a contracting party, as indicate that he is not going to perform his contract in the future. He may already have performed in part; part performance may have already become due from him under the contract, but not have been rendered; or the time when any performance is due from him may still be in the future. The essential elements which exist in all these cases is something still to be performed in the future under the contract, which, as he has made manifest, he is not going to perform. Whether the reason he discloses for his prospective failure to perform is because he cannot or because he will not seems wholly immaterial, though the word "repudiation" is more strictly appropriate to cases where an intention not to perform is manifest, irrespective of ability. In case such repudiation of a contract is made by one contracting party, the other may frequently at least take one of two courses."

Repudiation of Contracts, 14 Harvard Law Rev. 317.

This article is by Professor Samuel Williston, Professor of Law in Harvard University, and editor of a selection of cases on Sales, and the article in question is the most complete review of the authorities on the subject under consideration of which we have any knowledge.

We may concede the correctness of the view of the majority of the courts of the United States when applied to cases in which the repudiation consists in an open renunciation of the agreement, or inability to perform brought about by the destruction or other disposition of the subject matter of the contract. We have been unable, however, to find any cases in which the strict doctrine has been applied, where the inability to perform arises out of the non-existence of the subject matter at the time of the execution of the contract, and the fact of such non-existence was equally unknown to both parties. We think it to be clearly settled by all of the authorities that where a promissee finds that his promissor is unable to carry out his promise, that he may elect to rescind the contract.

See article on Repudiation of Contracts, supra.

This principle is also embodied in the statutory law of the State of Montana, as follows:

"A party to a contract may rescind the same in the following cases only.

4. If such consideration (the consideration for his obligation) before it is rendered to him fails in a material respect, from any cause."

Civil Code of Montana, Sec. 2271.

But as to the right of the injured party to maintain an action for the inability of a promissor prior to the specific time of performance, there is a conflict in the authorities. The State of Montana has apparently adopted the principle that a repudiation of a contract does not give an immediate right of action, but gives the other party the option of treating the contract as rescinded and excuses him from offering to perform in order to enforce his right.

Civil Code of Montana, Sec. 1956, provides:

"If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same on his part, and does not retract such notice before the time at which performance on his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions on his part in favor of the former."

Under the provisions of this statute, taken in connection with the provisions of Section 2271, it would seem that in Montana a right of action is not given prior to the time at which performance of the contract is due.

Daniels v. Newton, 114 Mass. 530.

Casston v. McDonald, (Neb.) 57 N. W. 157.

Stanford v. McGill, (N. D.) 72 N. W. 938.

Clark v. Casualty Co. 67 Fed. 222.

The statute merely declared the rule as it had previously been laid down by the Supreme Court of the Territory.

Isaacs v. McAndrews, 1 Mont., 437

At the time this case was submitted to the Master the question had not been authoritatively determined in the

federal courts, but by the recent decision of the Supreme Court, in the case of *Roehm v. Horst*, *178 U. S. 1*, it is held that the rule laid down in *Hochester v. De la Tour*, *2 E. L. & B. L. 678*, would be followed in the United States Courts. That rule as declared by the Supreme Court of the United States is to the effect that after the renunciation of a continuing agreement by one party, the other party is at liberty to consider himself absolved from any future performance o it, retaining his right to sue for any damages he has suffered from a breach of it; but that an option should be allowed to the injured party either to sue immediately or wait until the time when the act was to be done, still holding it as prospectively binding for the exercise of his option. If this court should take the view that in the absence of a decision thereon by the Supreme Court of Montana the interpretations put upon Section 1956 elsewhere are not binding upon the federal court, we then have the proposition established by the case of *Roehm v. Horst*, that the injured party has two remedies, either to rescind the contract, or to treat the contract as broken, with the right to bring an immediate action, or, at his option, wait until after the expiration of the time of performance. But the party who wishes to avail himself of either of these rights must manifest his election in some way and must do so without undue delay. Having once made his election, his rights are determined thereby.

14 Harvard Law Review 329, and cases cited therein.

If the respondents desired to treat the inability of appellants to deliver the 9,000 head of cattle as a breach of the contract, entitling them to a rescission, they should have notified the appellants of that fact the moment the fact of shortage became known to them. This, as we have seen, they did not do. Although they knew in the month of August, when Mr. McNamara called upon the National Bank of Commerce, that there would be a shortage, they elected to continue in force the contract and to accept and pay for deliveries made subsequent to that time (Rec. 229, 612, 613.) This action upon their part waived the breach and kept the contract alive for the benefit of the appellants, and binding in all of its obligations upon the respondents.

In Frost vs. Knight, L. R. 7 Ex., 111, quoted with approval by the Supreme Court of United States, Cockburn, C. J. lays down the rule as follows:

"The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of *Hochester v. De la Tour, 2 E. & B. 678*, and the *Danube & Black Sea Company vs. Xenos, 13 C. B. (N. S.) 825*, on the one hand and *Avery v. Bowden, 5 E. & B. 714*, *Reid v. Hoskins, 6 E. & B. 953*, and *Barwick v. Buba, 2 C. B. (N. C.) 536*, on the other, may be thus stated. The promissee, if he pleases, may treat the notice of intention as inoperative and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as

his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it. On the other hand, the promissee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

To the same effect is the language of Judge Taft:

"It is true that, where a contracting party gives notice of his intention not to comply with the obligations of his contract, the other contracting party may accept this as an anticipatory breach of the contract, and sue for damages without waiting until the time mentioned for the completion and fulfillment of the contract by its terms; but, in order to enable the latter to sue on such an anticipatory breach, he must accept it as such, and consider the contract at an end. If he elects to consider the contract still in force, he cannot recover thereafter without performing all the conditions of the contract by him to be performed. These principles are well settled and there are decisions by the Supreme Court of the United States which leave no doubt upon the subject. *Rolling-Mill v. Rhodes, 121 U. S. 255, 264, 7 Sup. Ct. 882; Dingley v. Oler, 117 U. S. 490, 6 Sup. Ct. 850; Smoot's Cases 15 Wall, 36; Johnstone v. Milling, 16 2 B. Div. 467: Elsas v.*

Meyer, 21 Wkly. Cin. Law Bul. 346; Leake, Cont. 872, and cases there cited. As Bullock & Co. did not elect to treat the attempted cancellation by Burger and the Brewing Company of the Burger contract as a repudiation of it no right of action whatever accrued to Bullock & Co., until they had delivered the rice thereunder.

Brewing Co. v. Bullock, 59 Fed. 83.

Mr. Beach lays down the rule as follows:

"If a promisee treats the notice of intention to repudiate a contract as inoperative, he keeps the contract alive for the benefit of the other party, as well as his own, he remains subject to all his own obligations and liabilities under it and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances, which would justify him in declining to complete it."

Beach Modern Law of Contracts, Sec. 414.

Johnston v. Millen, Law Rep. 4 Ex. 112.

Reed v. Haskins, 6 E. & B. 953.

Boswick v. Buba. 2 B. N. S. 563.

Bernstein v. Meech, 130 N. Y. 354.

Zuck v. McClure, 98 Pa. St. 541.

APPELLANTS NOT IN DEFAULT.

Going back to the happenings of October 22nd, we find that the appellants had delivered cattle as set forth in the Eleventh finding, had demanded payment therefor, but were ready and willing to deliver other cattle, if paid for those delivered. And it appears in the evidence that after the respondents had made the offer of adjustment

and payment, as found by the Master, that the appellants made two separate tenders of the remaining cattle and horses to the respondents, upon the condition that they, the respondents, would pay for the cattle theretofore delivered (Rec. 210.) In other words the appellants had refused to deliver cattle on account of respondents' refusal to pay for prior deliveries, but were doing all in their power to carry out their contract. We find appellants claiming that under their contract they had until the first day of November in which to complete deliveries of cattle, insisting that under the terms of their contract they had a right to payment for cattle as delivered. The appellants at no time refused to be bound by their contract. How willing they were to be bound by its terms is shown by the two offers to deliver cattle which they had on hand after the respondents had refused them payment for the cattle delivered except upon their own terms. It appears in the evidence that at the time the cattle were seized by respondents on the 23rd of October, the appellants had held these cattle in the hope that respondents would retract their decision and go on with the contract.

Sharp testifies that on the morning of the 23rd he went, on first getting up in the morning to see Blackman, because the cattle were being held on the hills, so if McNamara and Marlow changed their minds they (appellants) would be in a position to go on with the contract. And in addition to this, VanBlarcom of the National Bank had expressly told McNamara that they would

stand by the shortage clause and would be bound by it. Everything goes to show that the appellants were ready and willing to abide by the contract.

The appellants claimed and were right in their contention, that the Ninth clause of the contract gave them until the first day of November to perform and until that date expired they owed the respondents nothing; and in view of the fact that an adjustment of damages under the Ninth clause of the contract depended upon facts not in the knowledge of either party, such as the number of cattle that remained to be delivered and the number of strays, surely the appellants could in all reason claim that such an adjustment was a matter for future consideration and not one which the respondents had a right to make upon the 22nd day of October. Respondents could not say in reply to appellants' demand for payment, "Because you will owe us something by and by, we will hold what we owe you until that time occurs." Such was not the contract and they had no such right in law. It is clear that under the findings of fact by the Master and under the evidence in this case the appellants were not in default and that they were delivering cattle constantly under the contract and had cattle on hand to deliver. The fact that a time was approaching when they would be unable to deliver more cattle did not affect their position. They were not in default.

Neither would the insolvency of The Home Land & Cattle Company, assuming it to have existed, (and the Master has found that it was solvent) constitute a breach

of the contract, justifying non-performance on the part of respondents. The contract had been assigned to one able and willing to carry it out and the assignment recognized.

Pardee v. Kanaday, 100 N. Y. 121.

Hobbs v. Columbia Falls Brick Co., 31 N. E. 756.

This assignment became binding upon the National Bank of Commerce and bound it to carry out the terms of the contract.

Civil Code of Montana, Section 2134, provides:

"A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it so far as the facts are known, or ought to be known, to the person accepting it."

RESPONDENTS' DUTY TO MAKE PAYMENTS CONCURRENT WITH DELIVERIES.

By the express language of the contract, as we have shown above in our quotations from the contract and which we will not here repeat, payments were to be made concurrent with deliveries. Under the first clause the stock cattle were to be delivered in train load lots, but the only requirement in regard to the delivery of the steers and spayed heifers is that they are "to be delivered and counted at the same points when marketable for beef, in the opinion of said parties of the second part." There was no provision in the contract requiring appellants to deliver a specified number of steers at each delivery. They could deliver any reasonable number, call upon respondents to accept them and demand pay-

ment therefor, which by their contract respondents were then obliged to make.

McNamara himself testified that he had no control over the number of cattle which appellants could call a delivery. That the appellants could fix any number they saw fit, and he was bound to receive them. He says, "That was all I ever had to do with the cattle, take what they would give." (Rec. 593-4-596.)

And it clearly appears in the testimony that respondents did not claim to exercise any control over the cattle being held at delivery points by defendants. Thus appellants could take one thousand cattle to Oswego, deliver to respondents five hundred head of them on, say August 1, 1897, and if they saw fit hold the other five hundred there until August 10th, or for that matter until November 1st, and then call upon respondents to accept them. This was one of the rights given them by the contract. Because they had collected a thousand head of cattle at a point, they were not bound to deliver them all at one time. And when they had delivered the five hundred cattle, they were entitled to demand and to be paid for them under the contract. In other words, appellants had a right to fix the number of cattle to be delivered at any one time. The contract did not require them to deliver all they could gather together, or all respondents could receive, but only as many as they saw fit to deliver.

Applying this to October 22nd, 1897, we see that appellants could lawfully hold the 457 head of cattle and the horses at Oswego, until November 1st, 1897. They were

not required to deliver them October 22nd. They could deliver them on that day or not, as they chose. The respondents had expressly bound themselves to pay for the cattle as delivered and this they must do. The sole thing which could justify the respondents from performing their part of the contract would be the actual refusal of the appellants to deliver any cattle under the contract. It was nowhere provided in the contract that respondents could hold back a payment or any part thereof. Such an act would be a failure to perform on respondents' part. Supposing before the first delivery had been made under this contract respondents had counted appellants' cattle, as far as able, and had concluded that the shortage of steers and spayed heifers was 2,000 head, could they refuse on this ground to accept or to pay for the first delivery of cattle tendered them by the appellants? We contend not, for the reasons given above, viz: that such a contingency was foreseen and provided against in the contract. Could they then refuse to accept that delivery of cattle and yet not commit a breach of contract unless appellants permited them to deduct the estimated shortage under the Ninth clause of the contract? We think clearly not. And would not such a refusal at any time be such a breach of the contract on their part, as if made in the commencement thereof? The answer to this question is clear. The respondents were bound by the strongest words possible to use in contracting to accept and pay for the cattle as delivered. Until the appellants were actually in default, the re-

spondents were bound to carry out the terms of the contract.

Coming down to October 21st, there had been no breach of the contract on the part of appellants and no notice of any intention to abandon it. A train load lot of cattle had been delivered and received, for which payment was not made, and on the morning of the 22nd a lot, of the size demanded by respondents, had been delivered and not paid for. Had appellants the right to demand payment at the time they did and upon its refusal had they the right to refuse to go on with the contract?

It is immaterial whether or not Albert Niedringhaus told McNamara on October 1st that he would have to have drafts upon delivery. The contract called for them. The evidence is quite clear upon the subject, however, notwithstanding the pretended denial of it by both McNamara and Marlow, for in addition to appellants' testimony, Marlow says: "We knew from the power of attorney that Albert was to deliver cattle and receive drafts," and I heard Albert say when Mac gave him the receipt the night before, "We can fix this up in the morning Mac, when you get these other cattle that are to be delivered." (Rec. 370.) There was nothing to fix up but to issue a draft for the cattle received. Was there such a delivery as called for payment? Respondents pretended to claim they were entitled to all of the cattle then being held, before a draft was to be demanded. The contract, it seems to us, is plain upon the subject. Respondents attempted to construe it their way at the

start, but in August, VanBlarcom wrote that drafts must be issued upon deliveries, (Rec. 228), and always after that letter they were issued. (Rec. 417 et seq.) Nowhere is there any evidence of waiver of this provision. Marlow attempts to define what he understood by the words "complete delivery," or "entire delivery," as being "all the cattle they got on one trip," but the Master sustained objection to this upon the ground that the parties had defined by their contract what a complete delivery was. (Rec. 334.)

On the 26th of August, W. F. Niedringhaus told McNamara that he would have to have drafts after each day's delivery. (Record 490.)

And McNamara told W. F. Niedringhaus that he was prepared to make drafts as Niedringhaus wished after each day's delivery.

There need be no controversy about what took place on October 21st and 22nd. All of the parties agree that cattle were delivered on those days, which were not paid for. Appellants demanded payment for the cattle delivered before making further deliveries. If the respondents wished a further performance it was then their duty to make the payment demande.d Section 1955 of the Civil Code of Montana provides as follows:

"Before any party to an obligation can require another party to perform any act under it he must fulfill all conditions precedent thereto imposed upon himself, and must be able and offer to fulfill all conditions concurrent imposed upon him on the like fulfillment by the other party."

But respondents refused to make the payments or any payments. Instead they made the offer set forth in the Eleventh finding of fact.

RESPONDENTS COMMITTED A BREACH OF CONTRACT.

By their action in refusing to pay for a delivery of cattle or to pay for any cattle thereafter delivered, except on their own terms, respondents attempted to insert a new term in the contract, a condition to which appellants were not obliged to submit, so long as they were without default.

In the case of *Stephenson v. Cady, 117 Mass. 6* three contracts were entered into for the delivery of yarn. Delivery was commenced under the first contract and part of the installment delivered; and the delivery under the third separate contract was completed. By the terms of the contract the defendant, who was the seller and manufacturer of the yarn to be delivered, was to draw on the plaintiff as the deliveries were made. Certain deliveries were made on November 27th and 28th under the first contract and defendant drew three drafts upon the plaintiff covering the yarns delivered. The last draft, one for four hundred dollars, the plaintiff refused to accept. On December 1st, the defendant's mill in which the yarns had been and were expected to be manufactured, burned down. Thereupon plaintiff wrote defendant that he expected to hold the defendant to his contract, and made demand for the rest of the yarn, and said that he had not paid the draft for four hundred dollars upon

the ground that he held it as security for the performance of the contract. The defendant answered that he was under no legal obligation to fulfill the contracts, inasmuch as the plaintiff had violated them by refusing to accept or pay the draft for four hundred dollars. Defendant made no further deliveries of yarn. It was held that the contract was properly rescinded by the defendant. The court says:

"This is an action to recover damages for the defendant's refusal to perform the contracts declared on. The defense is that the plaintiff, himself, failed to perform his part of the agreements.

The three contracts were made on three different days, for the delivery of given quantities of yarn at a price named to be paid for on delivery. Part deliveries were made from time to time under the first and last contracts, and all those deliveries except the last were paid for at the time. By the terms of the second contract the deliveries under it were to commence when the quantity required by the first had all been shipped. And the question whether the plaintiff can recover anything for refusal to deliver under the second contract depends therefore on whether the conduct of the plaintiff justified the defendant's refusal to perform the first.

All the contracts are executory agreements for the sale of goods to be thereafter manufactured in the defendant's mill; they contain stipulations which impose upon one party the obligation to deliver, and upon the other the obligation to pay on delivery, and which are to be regarded as concurrent and mutually dependent conditions. Neither can maintain an action for the neglect and refusal of the other, without showing performance or its

equivalent on his part. Payment must keep pace with delivery. The natural construction of the contracts, as applied to the subject matter, implies that the goods were to be delivered as they were manufactured from time to time. And this construction is confirmed by the course of dealing, the deliveries and payments, and the settlement between the parties.

The case was tried by the court without a jury, and we are of opinion that the refusal of the plaintiff to pay for a delivery of yarn which had been made under the contract, 'unless the defendant would give security for the entire fulfillment of the contract,' was, under the circumstances disclosed sufficient to warrant a jury in finding the defendant justified in treating the contract as abandoned by the plaintiff, and as ended in its unfulfilled obligations upon him. It was a refusal to execute a substantial part of the agreement; an attempt, by holding on to the property without payment, to impose an onerous condition not contemplated by the original contract, and to which the defendant was not required to submit, so long as he was without default. It was something more than a refusal to pay for a single delivery. It was broad enough to be treated as a general refusal to make any further payments. It was prospective in its character, and was made with notice that such refusal would be regarded as releasing the defendant from all obligation to fulfill. Conduct less decisive has been held to justify nonperformance by the other party to the contract."

In *King v. Faist, 161 Mass. 449,* by the terms of a contract for the sale and delivery of a quantity of flour, the vendor was to ship the flour specified as the vendee might direct, drawing upon him demand drafts for the flour

shipped, and the vendee was to take out the flour by a certain date and to honor the drafts. A month before the time limited for withdrawing the flour, the vendee wrote to the vendor, "Before we pay any more drafts we want some assurance from you that you will make good any claims on account of quality," and stated orally to the agent of the vendor that he would pay no future drafts without some guaranty to protect him in case flour should on arrival prove deficient in quality and he returned a draft of the vendor unpaid. The vendor thereupon wrote: "We are not going to send any more flour." Held, that the vendor had a right to rescind the contract, the vendee having without justification declared his intention not to perform it, and that the letter of the vendor was an effectual rescission and released him thereafter from all obligation under the contract to deliver the flour. An action was instituted to recover damages for non-performance of the contract, and it was held that the plaintiff could not recover.

The case at bar is much stronger than the case of Stephenson vs. Cady, for the reason that the respondents refused to make payment for a delivery of cattle at a time when appellants were entitled to payment and at a time when they had more cattle to deliver under the contract, even admitting that these deliveries of October 21st, 22nd and 23rd were to be the last deliveries under the contract, a fact which we do not admit, as the evidence shows appellants intended to round up such steers and cattle as they could in the vicinity.

We think there can be no serious contention that respondents' refusal to pay for a delivery of cattle, when there were other deliveries to be made, constituted a breach of contract evincing their intention to be no longer bound by the terms of the contract, and justifying appellants in abandoning further performance. Non-payment is a clearer element of intention than words or circumstances, and a party is entitled to go on or cease carrying out a contract, according to what the other party actually does, not what he says he will do, or what he says his intention may be. There is no difference between non-payment and non-delivery in an installment contract. Both are acts and should be given more consideration than declared intentions.

Phillips Co. v. Seymour, 91 U. S. 646.
Stockdale v. Schuyler, 8 N. Y. S. 813.
Stephenson v. Cady, 117 Mass. 6.
King v. Faist, 161 Mass. 449.
Fletcher v. Cole, 23 Vt. 114.
Withers v. Reynolds, 2 Barn. & Ad. 882.

We think the weight of authority in this country leans to the side of reason and maintains the rule that the failure of a buyer to pay for an installment is a breach going to the essence of the contract and justifies the seller in refusing to proceed further.

Section 1955 Civil Code of Montana.
Hayes v. City of Nashville, 80 Fed. 641.
Wharton v. Winch, 140 N. Y. 287; 35 N. E. 589.
Bowdish v. Briggs, 39 N. Y. S. 371.
Ferris v. Wilson, 19 N. Y. S. 209.
Cunningham v. Ry. Co., 18 N. Y. S. 600.

Kuler v. Clifford, (*Ill.*) *46 N. E. 248.*
DeLoam v. Smith, (*Ga.*) *10 S. E. 436.*
Robson v. Bohn, *27*, *Minn. 333.*
Evans v. Ry. Co., *26 Ill. 189.*
Armstrong v. Coal Co. (*Minn.*) *49 N. W. 235; 50 N. W. 1029.*
Miller v. Sullivan, (*Tex.*) *35 S. W, 695.*
Gardner v. Clark, *21 N. Y. 399.*

The seller's refusal to make further deliveries until he had been paid for the last installment is not a breach of the contract.

Raabe v. Squire, *148 N. Y. 81; 42 N. E. 516.*

Defendant, in an action on a contract, cannot defeat recovery on the ground that the contract was entire, and that plaintiff did not fully perform it, where plaintiff's failure was caused by defendant's refusal to carry out his part of the contract.

Bowdish v. Briggs, *39 N. Y. S. 371.*

If the interpreted contract demands successive steps, now a step by one party, then a step by the other; whenever on the one side all is done which precedes performance on the other, the party on the other side breaks the contract if he simply neglects to take his step, though no demand on him is made.

Bishop on Contracts, *Sec. 1434.*

The doctrine laid down in *Mersey Co. v. Naylor*, *9 App. Cases 444*, is that failure to pay for an installment is not such a breach of the contract as entitles the vendor to rescind, unless it shows an intention to be no longer bound by the contract.

This doctrine is opposed to reason, as we have shown

above, and is not adhered to, closely even in England. Payment is impliedly a condition concurrent to obligation to deliver and a refusal to pay on delivery in a substantial breach and justifies the vendor in his refusal to further perform.

Mr. Benjamin in his work on Sales, after stating the doctrine of England to be that a default in paying the price would not justify an action for rescission of contract, unless the right be expressly preserved, which doctrine seems to be laid down by Mersey Co. vs. Naylor, inquires, "Can the seller rescind for default of payment?" and he says, "We have already seen that the right of the seller to rescind for default of payment is recognized in the American decisions, where the property is still in the possession of the seller, or it is delivered in expectation of immediate payment, which is not made. See Ante Sec. 335 et seq., Solomn vs. Hathaway, 126 Mass. 429; Hickox vs. Hoyt, 33 Conn. 553."

2 Benjamin on Sales, Sec. 1125, note 7.

Section 335 and the sections following treat the effect of payment in passing title to the property, and numerous cases are cited in which it is held that the seller may elect to keep the property as his own on default of payment, unless he has waived his right so to do; and by the cases cited it is apparent that this rule applies to sales to be paid for by promissory notes, or by cash, and that, where by the contract itself no time is fixed, the law implies that the payment is to be made in cash on delivery of the article sold.

But in any event, as said in Clark on Contracts, page 660.

"The courts are agreed that if a default in one item of a continuous contract of this nature is accompanied with an anouncement of an intention not to perform the contract upon the agreed terms, or, what amounts to the same thing, if the failure to perform is deliberate and intentional and not the result of inadvertance, or inability to perform, the rule we have been discussing does not apply. The other party, under these circumstances, may treat the contract as being at an end."

And in this case, the action of respondents clearly brings it within this rule, for it was deliberate and intentional, and plainly showed an intention to be no longer bound by the terms of the contract.

APPELLANTS NOT REQUIRED TO RESCIND.

The court held that this was not a severable contract, and seemed to be of the opinion that the appellants had lost some of their rights by failure to demand a rescission of the contract. But the court evidently labored under a misapprehension of the situation. The appellants were under no obligations to rescind for non-payment. They were not required to do anything but to refrain from performing and when sued plead the non-payment as a justification. This principle is recognized by Judge Taft in the case of *Cherry Valley Iron Works v. Florence Iron River Co. 64 Fed. 569*, the case relied upon by Judge Knowles. Besides the distinction between rescission and non-performance, as here contended for, has been recognized by the Supreme Court of the United

States as well as the Federal Circuit Courts.

The question is fully discussed in the case of *Hayes v. City of Nashville, 80 Fed. Rep. 641*, where the following language is used:

"It is well settled that a technical rescission of the contract has the legal effect of entitling each of the parties to be restored to the condition in which he was before the contract was made so far as that is possible, and that no rights accrue to either by the terms of the contract. But besides technical recission, there is a mode of abandoning a contract as a live and enforceable obligation, which still entitles the party declaring its abandonment to look to the contract to determine the compensation he may be entitled to under is terms for the breach which gave him the right of abandonment. In Mining Company vs. Humble, 153 U. S. 540, 541, 14 Sup. Ct. 876, 879, defendant excepted to the following instructions of the trial court: 'If the jury find from the evidence that the plaintiff were in good faith endeavoring to carry out and perform said contract according to its terms, and the defendant wantonly or carelessly and negligently interfered with and hindered and prevented the plaintiffs in such performance, to such an extent as to render the performance of it difficult and greatly decrease the profits which the plaintiffs would otherwise have made, then and in such case such interference was unauthorized and illegal, and would have justified the plaintiffs in abandoning the contract and would have entitled them to recover such damages as they actually suffered by being hindered and prevented from performing such contract.'

In sustaining the correctness of the charge the Supreme Court, speaking by Mr. Justice Brewer, said:

'It is insisted, and authorities are cited in support thereof, that a party canont rescind a contract, and at the same time recover damages for his non-performance. But no such proposition as that is contained in that instruction. It only lays down the rule—and it lays that down correctly—which obtains when there is a breach of a contract. Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken, and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a recission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about. Generally speaking it is true that when a contract is not performed the party who is guilty of the first breach is the one upon whom rests all the liability for the non-performance. A party who engages to do work has a right to proceed free from any let or hindrance of the other party; and if such other party interferes—hinders and prevents the doing of the work—to such an extent as to render its performance difficult and largely diminish the profits, the first may treat the contract as broken, and is not bound to proceed under the added burdens and increased expense. It may stop and sue for damages which it has sustained by reason of the non-performance which the other has caused.'

It very frequently happens that laymen do not distinguish between these two ways of ending a contract, and, therefore, that words are used by a party which, literally and strictly construed, would effect a complete rescission and destruction of the contract, when the party's real in-

tention is only to declare his release from further obligation to comply with the terms of the contract by the default of the other party, and his intention to hold the other for damages. In such cases courts consider, not only the language of the party, but all the circumstances, including the effect of a complete rescission upon the rights of the parties, and the probability or improbability that the complaining party intended such a result, in reaching a conclusion as to the proper construction of the language used."

III.

RESPONDENTS NEVER TENDERED PERFORMANCE.

Assignments of Error numbered Fifteen and Sixteen attack the rulings of the court and Master upon the sufficiency of the tender of performance made by the respondents on the 22nd day of October.

Civil Code of Montana, Section 2029 provides as follows

"An offer to perform must be free from any conditions which the creditor is not bound on his part to perform."

Section 2021 is to the effect:

"An offer of partial performance is of no effect."

It is not in the nature of a tender to make conditions, terms or qualifications, but simply to pay the sum tendered as for an admitted debt.

Wood v. Hitchcock, 20 Wend. 47.

Brooklyn Bank v. DeGraw, 23 Wend. 342.

Eddy v. O'Harra, 14 Wend. 21.

The offer of the respondents fails to fulfill any of these conditions. It is not absolute and unqualified. The ap-

pellants had delivered cattle for which they were entitled to payment. The respondents refused to pay for a delivery of cattle. They made a tender of payment, which was no tender in law, because they attached thereto conditions not contemplated by the contract. They took the law into their own hands and attempted to make a full adjustment of any damages they might suffer. We do not see how it can be contended respondents' offer was an offer made in compliance with the contract.

We contend that respondents should have made on October 22nd, 1897, a tender of the exact amount due appellants for cattle delivered, before they were entitled to have any more cattle delivered them, or before they could claim any rights under the Ninth clause of the contract. If they had made such an offer of payment and the appellants had refused to accept it and to complete the deliveries, then and then only would the appellants have been in default under this contract. As a matter of fact if they had made such an offer, the evidence clearly shows appellants would have accepted it, and would have gone ahead with their contract and this controversy never would have arisen.

We claim, and we think rightly, that respondents' offer of performance was no offer, because,

(1) There was no liability under the Ninth clause of the contract until November 1st, 1897.

(2 At the time respondents made their offer appellants had other cattle on hand to deliver and the deliveries were not complete.

(3) Appellants were entitled to claim the full contract time, that is until November 1st, 1897, in which to make deliveries and after delivering the 500 head of horses were entitled to use the 200 remaining head or round up steers on the river banks and elsewhere, as the evidence shows it was their purpose to do, and were entitled to the time remaining between October 22nd and November 1st, in which to do this.

(4) The exact number of strays shipped to the market was not known and the offer was inexact as to this.

(5) Appellants had a right to claim that the provision in the Ninth clause was a penalty under the law and that they could not be compelled to pay the full amount named, that is, $20.00 per head for shortage, but that they were liable only for actual damages suffered by the respondents.

(6) That in determining the actual damages they were entitled to consider any change which might occur in the market between October 22nd and November 1st and that respondents could not arbirtarily bind them to the date October 22nd.

NINTH CLAUSE VOID.

The amount tendered by the respondents to the appellants in payment for cattle delivered and to be delivered on October 22nd, 1897, was ascertained after computing the value of the steer shortage at the rate specified in the Ninth clause of the contract. But this Ninth clause of the contract is void, in so far as it fixes a rate of compensation, because it attempts to determine in anticipation

of a breach of the contract, the compensation to be made therefor, and the respondents would only be entitled to set off against the shortage the difference between the market value of the cattle and the contract price at the time they were to be delivered.

Civil Code of Montana provides as follows:

Section 2243. Every contract by which the amount of damages to be paid, or other compensation to be made for a breach of the obligation is determined in anticipation thereof is to that extent void, except as expressly provided in the next section.

Section 2244. The parties to a contract may agree therein upon the amount which shall be presumed to be the amount of damages sustained by a breach thereof, when from the nature of the case it would be impracticable or extremely difficult to fix the actual damages."

These sections of the Civil Code were taken from the Civil Code of California, after the decision in the case of *Pacific Factory Co. v. Adler, 90 Cal. 110; 22 Pac. Rep. 36.*

We might well rest our contention as to the validity of these sections and their application to the present controversy, upon this decision. In that case the Supreme Court of California held that a contract for the sale of grain bags providing a penalty of three cents for each bag which the vendor refused to deliver, was void, such contract not presenting a case where it would be extremely difficult to determine the damages. But these sections did not incorporate into the law of Montana any new feature or principle. They simply announced the doctrine, well settled before by the decisions, as to the dif-

erence between a penalty and liquidated damages. Long before the passage of these sections of the statute, courts had refused to regard a specified sum agreed upon by the parties as liquidated damages, as the measure of recovery, regardless of the actual amount of loss or damage sustained by the breach of the contract, and this, too, without regard to how the parties themselves had stipulated, or by what name they had described the sum thus to be paid in this contract. It might be called "liquidated," "stated" or "stipulated" damages, or a "penalty," but naming it thus did not make it so, and courts disregarding these terms inquired as to whether in fact the damage could be ascertained, or whether it was extremely difficult to fix the just measure of compensation for the breach of the contract in each particular case.

An interesting note upon this subject is found appended to the case of *Graham v. Bickham, 1 Am. Dec. 328-331*, and an examination of the authorities there cited will aid us in determining whether the twenty dollars per head specified in this contract is to be regarded as a penalty under Section 2243, or as liquidated damages, and thus falling under the provisions of Section 2244 of the Civil Code.

In Estley vs. Weldon, 2 Bas. & P. 346, the defendant entered into an agreement to perform at the plaintiff's theatre for a stipulated price, and a clause was inserted that if either party neglected to perform his agreement he should pay $250 to the other. Here on the one side was the contract of an actor to perform, and on the other side of the manager to pay a stipulated price. The de-

fendant, who was the actor, refused to perform, and here was a case where it might seem that it would be "impracticable or extremely difficult to fix the damages." But the court held it to be a penalty merely, and that plaintiff could only recover his actual damages.

Kimball v. Farren, 6 Bing. 141, is a similar case. In this case there was a clause in the agreement which read that if either party failed to fulfill his agreement or any part thereof, or any stipulation therein contained, such party should pay the other the sum of one thousand pounds, to which sum it was agreed the damages should amount, and which sum was declared by the parties "liquidated and ascertained damages and not a penalty or a penal sum or in the nature thereof." The defendant having refused to act, his manager sued him and recovered damages in the sum of seven hundred and fifty pounds. A motion to increase it to one thousand pounds was denied.

In *Davis v. Penton, 6 B. & C. 216,* there was an agreement to sell a stock and good will of a business and the vendor agreed not to carry on business within five miles of the house wherein the stock sold was situated. There was also an agreement on the part of the vendee to take certain furniture and fixtures in connection with the sale thus made, at a price to be thereafter fixed, and each party bound itself in the penal sum of five hundred pounds, to be recoverable for the breach of the agreement, and by way of liquidated damages. It was held to be a penalty merely, to secure such damages as the in-

jured party ought to receive. This case shows the reluctance with which courts treat stipulations of this kind as liquidated damages, and their strong inclination to regard them in every case as merely a penalty. The plaintiff in this case had covenanted to pay two notes, one for four hundreds pounds and one for £170.4, and the test applied by Bailey J. in determining whether the sum named was to be treated as a penalty or as liquidated damages was, that where it was to be regarded as security for the performance of several acts and it appeared that in some instances it was too large and in others too small, it would be treated as a penalty. He says:

"It could not have been intended here to fix the sum of £500 as a maximum, if nothing was paid in respect to either of these bills, for in that case the party would be entitled to receive £570.4; in that case £500 would be too small a compensation for the breach of the agreement. On the other hand if the £400 had been paid and that for £170.4 alone remained unpaid, the £500 would much exceed a fair compensation for the breach of the agreement."

It is to be remembered that here the plaintiff was suing the defendant for going into business within five miles of where the business he had sold was located, and the defendant answered, pleading by way of justification, that the plaintiff had executed these two notes, as a part consideration for the purchase price, and had not paid them.

In *Sainter v. Ferguson*, 7 *C. B. 716*, there was a case somewhat similar in its facts to the one last cited. The defendant had agreed not to practice as a surgeon or apothecary at Maclesfield, or within seven miles thereof

under a penalty of £500. Here was a case like the case of plaintiff in Davis vs. Penton, where it was "impracticable or extremely difficult to fix the actual damage," but the contract in this case was unilateral, and the court held that although the word "penalty" was used, it was in reality liquidated damages.

A good illustration of liquidated damages is the case of *Lowe v. Beers, 4 Burr, 2225*, where the defendant stipulated to pay the plaintiff £1,000 if he should marry anyone else but her. Here was a case where it was clearly "impracticable to fix the actual damage."

Mr. Proffatt in the note already referred to says:

"An examination of the cases in this country will show that the principle of construction deduced from the English authorities cited are followed with perhaps a greater inclination to regard the sum named as a penalty. Thus Shaw J. in *Shute v. Taylor, 5 Metc. 67*, says: 'In general it is the tendency and preference of the law to regard a sum stated to be payable if a contract is not fulfilled, as a penalty and not as liquidated damages, because then it may be apportioned to the loss actually sustained.'"

An illustration of this is *Bagley v. Peddie, 16 N. Y. 469.* This was an action brought to recover damages for the non-performance of articles of agreement by which, among other things, the defendant was to serve the plaintiff according to the best of his ability in the business of making gold pens and not disclose any of the improvements or inventions of the plaintiff in the business; that he would attend faithfully to all things entrusted to him,

not embezzle or purloin any money or goods and that he would render a true account of all things committed to his care whenever the plaintiff should require it. Three thousand dollars was named in the instrument for liquidated damages for breach of the contract. No special damages being shown the plaintiff was non-suited. Shanklin J., in rendering the decision of the court on appeal, says:

"Although the courts have uniformly conceded to parties the right to fix the amount of damages in advance of the breach of the contract, and at any sum however disproportioned to the real damages they shall see fit, and have likewise conceded that it is a question of intention to be derived from the scope and tenor of the agreement, yet when the judicial mind has acted upon this class of cases, it is evident how repugnant it has been to enforce them according to the express language of the contracting parties. Hence have sprung up a series of artificial rules peculiar to contracts of this character, which, while they ostensibly profess to comply with the fundamental canons of construction appertaining to legal science, contrive to contravene them by artificial distinctions and limitations."

The judgment of the court below was reversed, for the reason that it was held to be difficult to prove the actual damages the plaintiff would sustain by the defendant leaving his employ and revealing to others the secrets of his trade.

While it is true, as stated by the Judge in the foregoing opinion, that courts have uniformly conceded to parties the right to fix the amount of their damages in ad-

vance, it is obvious that under the provisions of our Code Sections 2243 and 2244 this right has been taken away, except in the cases provided for in the section last named, which, when we come to consider the decided cases, covers about all of the cases in which the courts have heretofore allowed such a stipulation to be enforced.

In *Maxwell v. Allen, 2 Atl. 386,* one partner agreed in writing to sell to his co-partner his interest in a store and stock of goods, good will of the business, etc., and a forfeiture of $500 was stipulated against either party who should break the contract. The court held that this was to be regarded as liquidated damages, and says: "The good will of the business was an element of value not easily measured."

In *Keeble v. Keeble, 5 So. 149,* the party being employed as a business manager in a store, entered into a contract to keep sober and abstain from the use of intoxicating drinks during the term of his employment, agreeing to pay as liquidated damages the sum of $1,000 in case he violated his agrement. He became intoxicated and remained so for a long time, injuring the business. It was held that this was a case of liquidated damages and not a penalty, the court holding that it was a case where the damages were uncertain, fluctuating and inacapable of easy ascertainment.

In *Tennessee Mfg. Co. v. James, 18 S. W. 262,* a minor was employed in a cotton mill. By the terms of her employment if she quit without giving two weeks notice she was to forfeit ten dollars of her wages. The court

in rendering its decision quoted with approval from Sutherland on Damages, 490 to the effect that: "the tendency and preference of the law is to regard stated sums as a penalty, because actual damages can then be recovered and the recovery limited to such damages." The court, however, in the case at bar held that it was one of liquidated damages, inasmuch as the work in a cotton mill was divided into many departments, one dependent upon the other, and that there was no ready means of estimating the loss which would occur in the various departments by reason of a skilled operative quitting without the requisite notice being given.

In *Fasler v. Beard*, (*32 Minn.*) *38 N. W. 755*, an agreement had been entered into by which the defendant had covenanted to cause a certain mortagage appearing of record, as an incumbrance upon certain lands, which he had sold to the plaintiff, to be discharged within one year's time, and in case of his default damages for the breach of such covenant were fixed and stipulated at the sum of $500. The court held that it was a case of liquidated damages, the injury in question being uncertain in itself and insusceptible of benig reduced to a certainty by legal computation.

The cases cited sufficiently show the class of cases wherein, in the language of Section 2244, it would be "impracticable or extremely difficult to fix the actual damage." It will be noted that none of these cases were cases of the sale of ordinary personal property, such as stock or beef cattle.

Upon the decision of the demurrer in this case the court held that it was a question of fact to be determined from the evidence, as to whether the amount of damages sustained by the respondents could be ascertained. The question was submitted to the Master and in his Sixteenth finding, he finds the increase in the value of cattle during the season of 1897 to be $5.00 per head, so that the exact amount of damages that the respondents would suffer not only could be, but has been, ascertained. This provision of the Ninth clause was therefore a penalty and even if the respondents' offer of payment could be upheld on other grounds, they would have the right to deduct from the amount due for cattle delivered only the amount of their damages. On this ground alone their tender of payment was insufficient, and the Court should have so held.

IV.

NO RIGHT TO SPECIFIC PERFORMANCE.

The Twelfth, Thirteenth, Eighteenth and Twentieth Assignments of Error present the question of the jurisdiction of the court to specifically enforce the contract in suit by requiring the delivery of the stock cattle which appellants had on hand October 23, 1897. This contract was one for the sale and delivery of personal property, viz cattle. The appellants did not agree to deliver any specific number of stock cattle during the year 1897. The guaranty as to number referred only to beef cattle. It will thus be seen that the court in decreeing the delivery of stock cattle is only doing so to enable the respondents

to set off against the purchase price of one class of cattle, the damages sustained by failure to deliver another grade. We have been unable to find any authority for this use of the power of a court of equity.

Contracts for the delivery of personal property are not usually enforceable specifically, for the reason that ordinarily the breach can be compensated by damages. Hence articles of such character that their market value is easily ascertainable and as are found in the ordinary market, cannot be made the basis of equity consideration.

Pomeroy Equity Jurisprudence, Sec. 1402.
22 Am. & Eng. Ency. Law, p. 991.
Scott v. Bilgerry, 40 Miss. 119.
Ferguson v. Paschal, 11 Mo. 267.

A complainant cannot maintain a suit in equity to enforce the specific performance of a contract, where he has a complete remedy at law.

Beach on Modern Law of Contracts, Sec. 879.
Smith v. Gas. Co., 154 U. S. 557.

In this case there are no grounds upon which a specific performance of the contract can be had. The finding of the Master clearly shows that the amount of the advance in cattle could be easily determined and is definitely fixed in the finding. Finding Seventeen to the effect that the plaintiffs depended upon these deliveries of cattle to furnish cattle for its beef contract with the Government Indian Reservation, and finding Eighteen that they had provided hay and provisions to winter stock at their ranch are not sufficient to justify the specific performance

of this contract, for the reason that there is no finding that the damages arising under either of these could not be compensated at law. And in regard to the Indian contract, McNamara testified that he had plenty of cattle of his own to fill these contracts and could have filled them from his own cattle at a loss of about two dollars per head, over what it would cost him to fill them with the cattle involved in this case.

Their action for specific performance in this case is thus wholly unsupported by the evidence and it clearly appears that they had a very adequate and complete remedy at law. If they did not, the burden of proof was upon them to show this fact fully and clearly. Under the head of "Relief" in our Civil Code, occurs the following provision:

"It is to be presumed that the breach of an agreement to transfer personal property can be adequately relieved by pecuniary compensation."

Civil Code of Montana, Sec. 4413.

In addition to this we might say that the contract is not one that can be specifically enforced, for the reason that it contains a penalty for the breach thereof.

Beach Modern Law of Contracts, Sec. 879.
O'Connor v. Tyrrell, 30 Atl. 1061.
Hahn v. Concordia Society, 42 Md. 460.
St. Mary v. Stockton, 8 N. J. Eq. 520.

In the latter case the Chancellor says, page 531:

"Again by the agreement of sale and purchase in this case, a certain sum is agreed, fixed upon and stipulated as a liquidated satisfaction to be made and paid in case

of breach of said agreement by either party, to the other performing. The parties have fixed their own measure of damages for the breach of the agreement; and whether the sum from its amount, five thousand dollars, should be considered by this court as liquidated damages, or only in the nature of a penalty, which I have not now the means of determining, this provision of the agreement shows that each party contemplated a resort to an action at law for damages in case of the failure of the other to perform his part."

Under the provisions of the statute if the damages arising from the failure to deliver the 9,000 head of steers could not be easily ascertained, then the agreement to pay $20 per head became operative. If they could be easily ascertained then a judgment therefor would be compensation. In the case at bar they not only could be, but have been ascertained, and that too from respondents' own testimony.

It is difficult to perceive upon what theory the court ordered a decree in the case. In the opinion the court seems to confuse the parties. He says (Rec. 58) The Home Land & Cattle Company had no right to demand payment, because the money had been assigned and that the Bank had no control over the cattle. The Cattle Company was not demanding payment, because the power of attorney came from the Bank, whose rights in the matter had been recognized by respondents. Again the court says it was not right for the Company to demand payment to another, when the result of this payment would render it impossible for respondents to re-

cover damages in this jurisdiction. But this was not the fault of the Company and this state of things existed when the contract was first entered into and when it was assigned to the bank. The respondents knew when the contract was made that they were buying all of the valuable assets of the Company in Montana, and that if an action for damages was to be brought, they would have to go elsewhere to satisfy the judgment. They also knew when the assignment was made to the Bank that the money was to be paid to it; and they went to St. Louis to ascertain whether or not the Bank understood that it was assuming the obligations of the contract, and after an affirmative response, they elected to proceed with the contract. That election bound them, and insolvency of the Cattle Company became an immaterial element in the case. This phase of the case was entirely ignored by the trial Judge and hence his error. The case cited by him, *Johnson v. Brooks, 93 N. Y. 343*, is illustrative of the class of cases in which a court of equity will decree specific performance of a contract for the delivery of chattels in cases of insolvency. It will be noted that in that case the plaintiff had paid the entire consideration for the stock of which delivery was sought. In such cases, if delivery is not enforced, the party gets nothing. But in the case at bar the respondents had not paid the consideration for the 451 head. They had not even paid for cattle which had been delivered, nor tendered the amount due therefor. Hence insolvency, if it existed, was not a ground for specific performance, although it might have

been a defense for non-payment.

14 Harvard Law Review 427, and cases cited.

But the Master found that the Company was not insolvent, and the court held that this finding was binding. Yet we find him arguing in his opinion that because the Company was insolvent in Montana it should not be heard. We know of no rule of law that requires suitors to be solvent in every jurisdiction in which their rights are involved. This Company was solvent in the State of its residence, and any insolvency in the State of Montana was due to the fact that respondents had bought all of its assets in that State. Certainly they cannot base any cause of action out of a state of facts of their own creation.

Besides, a party who insists upon specific performance by the other party, must show specific performance on his own part. If a recission or abandonment is desired, he need only show non-performance or inability to perform by the other party.

Runkle vs. Johnson, 83 Am. Dec. 191.

To obtain specific performance of a contract, complainant must show performance on his part of the express and essential terms of the contract.

Fry on Specific Performance, Sec. 904.

Pomeroy, Sec. 534.

Where the contract shows that plaintiff has failed to meet the substantial terms of the very agreement on which he relied, he cannot complain if a court of equity leaves him where he has placed himself.

Beach Modern Law of Contracts, Sec. 897.

It is a fundamental doctrine of the court of equity that neither party to a contract will be permitted to enforce it specifically against the other, until he has shown that he has done or offered to do every material act or thing required of him by the agreement, in exact accordance with its terms and conditions.

To be in a position to demand a specific performance of this contract, the respondents should have exactly performed every act which the contract called upon them to perform. They should have made every payment as it fell due, and having failed to do this, they cannot now come into this court and demand that the appellants be compelled to perform a contract which they, themselves, have treated as null and void.

We therefore respectfully submit that the court erred in the particulars complained of, and that the judgment should be reversed with instructions to dismiss the bill for want of equity.

Respectfuly submitted.

W. E. CULLEN,

E. C. DAY,

W. E. CULLEN, JR.,

Solicitors for Appellants.

No. 683

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

HOME LAND AND CATTLE COMPANY, a Corporation, and THE NATIONAL BANK OF COMMERCE in St. Louis, a National Banking Corporation,

Appellants,

vs.

CORNELIUS J. McNAMARA and THOMAS A. MARLOW, Copartners under the style and firm name of McNamara & Marlow,

Appellees.

Additional Brief of Appellants.

Appeal from the Circuit Court of the United States for the District of Montana.

FILMER-ROLLINS CO. PRINT, 424 SANSOME ST., S. F.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE EIGHTH CIRCUIT.

HOME LAND AND CATTLE COMPANY, a Corporation, and THE NATIONAL BANK OF COMMERCE in St. Louis, a National Banking Corporation,

Appellants,

vs.

CORNELIUS J. McNAMARA and THOMAS A. MARLOW, Copartners under the style and firm name of McNamara & Marlow,

Appellees.

ADDITIONAL BRIEF OF APPELLANTS.

In pursuance to the leave granted by this Court, appellants file this additional brief and respectfully submit that the contract, out of which this suit arose, was executed in Chicago, but was to be performed in Montana. Therefore the laws of Montana should govern.

The master found that appellant, Cattle Company, was a Missouri Corporation and that appellant, Bank of Commerce, was a national banking institution incorporated under the Acts of Congress of the United States, and was a citizen and resident of Missouri (Findings 2 and 3). That the contract in question was executed by the parties thereto (Finding 4) on May 27th, 1897, and said Cattle Company assigned its interest in said contract to said Bank of Commerce, May 28th, 1897.

The master further found that both appellants were solvent and amply able to respond to appellees for any damage they might suffer by reason of appellants' failure to complete the contract in question.

The master did not find that the particular cattle covered by the contract in question were peculiarly needed by the appellees, nor that they had any special value different from any other range cattle, nor that appellees could not have purchased other cattle elsewhere to supply the shortage claimed by them, and charged the difference between their cost price and the contract price to appellants.

The master found that the difference between the contract price and the market value of the cattle was five dollars a head (Finding 16.)

Under these findings of solvency on the part of appellants, the actual monetary damage to appellees' coupled with the fact that there was no peculiar value to appellees of the property, there is no showing whereby a Court of Equity could or should exercise its discretion and decree specific performance. Nor have appellees made any tender of payment for the property of appellants, excepting a tender of settlement wherein they charged appellants and deducted twenty dollars a head as liquidated damages for the shortage.

We earnestly contend that under these facts specific performance should not have been decreed. Appellees' cause of action was not by suit for specific performance but by an action at law for damages: Or, if they desired the Montana Courts to retain jurisdiction, by attachment.

If a debtor is solvent it is only right and proper that his creditor be compelled to reduce his claim to a judgment before he demands possession of his debtor's property. It is not right or proper that a creditor be allowed to place a receiver in possession of his solvent debtor's property simply because he has a claim against such debtor. Receivership, specific performance or any other form of equitable relief should not be had simply for the asking, but only where good cause is shown. In the case at bar there is absolutely no reason why appellee should not pursued his legal remedy as there was an adequate remedy at law.

And it should have been so ordered by the Court below.

It is quite evident from the opinion filed by the Court below that specific performance was decreed, not because it was appellees' proper remedy, but because they would be forced to go to Missouri and prosecute their demands in that State, and that they could not have done so with any assurance of obtaining complete redress.

Although finding appellants perfectly solvent, the Court declared: "As far as the defendant, the Home Land and Cattle Company is concerned, I think it may be treated as if insolvent in Montana." The Court below further said, "and although said Cattle Company had other cattle on the range and scattered, it would seem unjust to require a creditor to hunt them up in order to render them subject to his demand."

In other words, if a company, corporation or indivual undertakes to transact business in any State other

than the one in which it resides, and enters into any contractual relation with a citizen or company in that other State, before doing so, must keep in that other State sufficient assets to cover all liabilities, fixed or contingent, or be declared insolvent and have its business taken charge of and wound up by a receiver. And this, too, no matter how solvent the individual, firm or corporation may be in the State where its head or chief place of business is.

If the Court below is correct in this opinion, then it is doubtful if there is a corporation, firm or individual in the United States engaging in a manufacturing or wholesale business is solvent in any State in the Union outside of the State in which their principal office is situated. Such a ruling as this is manifest error, is extremely dangerous to the business world and we submit should be corrected by this Court.

SPECIFIC PERFORMANCE.

The only conditions under which specific performance should be decreed are found in section 4410 of the Montana Code, and are, 1st, in the enforcement of specific performance of an express trust; 2d, when pecuniary compensation would not afford adequate relief; 3d, when it would be extremely difficult to ascertain the actual damage caused by the nonperformance; or 4th, when specific performance has been actually agreed on in writing by the parties.

It will be readily seen that specific performance could not be demanded and should not have been decreed under any of the foregoing provisions. There was no express trust, nor was there any agreement between

the parties in writing for specific performance, nor was it a case where pecuniary compensation would not have afforded adequate relief, nor was it difficult to ascertain the actual damage to appeelles caused by the nonperformance on the part of appellants.

On the contrary, the master found the difference to be $5.00 a head on a shortage of 1860 head, or $9,300.

This fact ascertained by the master could easily have been ascertained by appeelles, and, as appellants were absolutely solvent, specific performance should not have been decreed, and the bill should have been dismissed.

But what did the Court decree? Did the Court decree specific performance, with a further order that appellees pay the purchase price to the receiver, with which to pay the expense of this litigation and the balance to appellants? No; but on the contrary, it ordered appellant's cattle, or the proceeds thereof, turned over to the appellees, and thereupon the receiver shall stand discharged without further liability. In other words, the cattle are turned over to the appellees without consideration; which is nothing more or less than a total confiscation of appellant's property without any compensation therefor. The Court neither ordered nor provided for a credit to be allowed to defendants for these cattle, no payment to be made to, or settlement with, the receiver—merely orders the property, or the proceeds thereof, turned over to appellees and the receiver to be discharged from further responsibility. And in addition to the confiscation of appellant's property, appellants must pay all costs. A mere suggestion of the inequity and injustice of this decree and hardship worked on

these appellants should, we submit, be sufficient to cause a rescission of the decree in this case.

PENALTY.

This contract, to be performed in Montana, should be governed by the statutes of that state.

Sections 2243 and 2244 of that state, adopted from the state of California, read as follows:

Section 2243. Every contract, by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation is determined in anticipation thereof, is, to that extent, void, except as expressly provided in the next section.

Section 2244. The parties to a contract may agree upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when from the nature of the case it would be impracticable or extremely difficult to fix the actual damage.

Now construing the penalty of twenty dollars per head as contained in the ninth clause of the contract, we submit that it must be construed as a penalty and not liquidated damages, for the reason that "from the nature of the case it would be impracticable or extremely difficult to fix the actual damage." The actual damage was ascertained, found, and fixed the master by testimony just as any other fact should be proven. It therefore follows that, under the sections before quoted, this clause of the contract is void.

And although the section above quoted voids this ninth clause of the contract, and although appellees could have ascertained their exact damages and sued therefor in law, yet they come into a court of equity seeking equity, and at the same time are confessedly retaining $38,450

of defendants' money, when they are entitled to only $9,300, leaving in their hands due to appellants $29,-150.00. Nor is there any order or decree that such sum be turned over to appellants. As the case now stands, appellees are to retain appellants' property, make no accounting, and retain $38,450 in payment of a $9,300 claim.

The record shows that the day before the receiver was appointed the appellants delivered to appellees 933 head of cattle at $25.00 per head, $23,325. The next day the receiver took 457 head, which at $25.00 a head, $11,425. Appellees had collected for 148 head of strays, which at $25.00, $3,700. Making a total due appellants, $38,450. Appellants owe appellees on shortage $5 a head on 1,860 head, $9,300. Balance due to appellants from appellees and receiver for cattle delivered and not paid for, $29,150.

The master's report, adopted by the Court below, finds in section 11 that appellees made a tender to appellants which included 113 strays at $25.00 per head, and in finding No. 8 finds that appellees had received the proceeds of 148 head. In other words, the findings show that appellants are entitled to the proceeds of 148 head of strays, and not 113, as set out in appellees' tender. And this discrepancy discloses another fact. The tender, as made by appellees, was not a valid tender, as it was $875 less than it should have been, being the difference between 113 strays and 148 strays, or 35 strays at $25 per head.

We therefore respectfully submit that:

1st. The Court below had no jurisdiction to decree specific performance in this case;

2d. Appellees' remedy was by attachment or suit for debt;

3d. The decree in this case is unjust and does not equitably settle the affairs between the parties litigant;

4th. The decree is improper in that it turns appellants' property over to appellees, with no provision for payment by appellees, nor for an accounting of any manner or kind, and discharges the receiver

5th. The tender made by appellees was not a proper tender, in that it was $875 less than it should have been according to appellees' construction of the ninth clause.

6th. The court erred in adopting the first and second conclusions of law submitted by the master in this, that the facts show that appellants were performing the conditions on them imposed up to the time the receiver was appointed, and that appellees had refused to carry out the conditions on them imposed by refusing to pay for cattle as delivered to them in carload lots.

King v. Faist, 161 Mass. 449.
Stephenson v. Cody, 117 Mass. 6.

7th. Appellees committed the first breach of the contract by refusing to pay for cattle when delivered in carload lots.

Hayes v. Nashville, 80 Fed. 611.

8th. The court erred in decreeing specific performance for the further reason that the contract provided a penalty. Where a penalty is provided, the failure to carry out the conditions of the contract matures the penalty, and is not a breach.

Beach Modern Law of Contracts, sec. 416.
Ehrlick v. Ins. Co., 15 S. W. 530.

Respectfully Submitted,

F. C. SHARP.
Of Counsel.

683

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HOME LAND AND CATTLE COMPANY, (a corporation), and THE NATIONAL BANK OF COMMERCE, (a corporation),

Appellants,

vs.

CORNELIUS J. McNAMARA AND THOMAS A. MARLOW, COPARTNERS UNDER THE FIRM NAME AND STYLE OF McNAMARA & MARLOW,

Appellees.

BRIEF OF APPELLEES.

H. G. McINTIRE,
S. H. McINTIRE,
Solicitors for Appellees.

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Appellees.

BRIEF OF APPELLEES.

This cause, after issue joined, was referred on November 26, 1898 by consent of the respective parties, the order of reference reading:

"It is hereby ordered that all and singular the issues in the said cause be and the same are hereby referred to Henry N. Blake master of this court, to hear the testimony and proof of the respective parties as to such issues, and report the same to this court, together with his conclusions of fact and law thereon, according to the rules and practice of this court in such case made and provided." (Record page 28).

In pursuance thereof the master heard voluminous testimony and proof (Record pages 62-614) and made his

findings of fact and conclusions of law thereon. (Record pages 29-37) which were filed and entered in the cause on September 14, 1899 (Record page 37). To these findings and conclusions, the defendants on October 11, 1899 filed certain exceptions (Record pages 38-42) and the plaintiffs on October 13, 1899 filed also certain exceptions and requests for additional findings of fact upon the evidence adduced before the master (Record pages 42-46). No further or additional testimony than that reported by the master was offered or introduced in the cause. The cause thereupon came on for hearing, was argued and submitted to the court. The court on December 10, 1900 filed a written opinion, concluding with the statement, "With this view of the law and the facts presented in this case I have reached the conclusion that sufficient equities are presented to entitle complainants to the relief prayed for in their bill", confirmed the master's report and ordered a decree in favor of complainants (Record pages 50-60). A final decree was thereupon entered in favor of plaintiffs (Record pages 47-49) from which the present appeal is taken, appellants specifying twenty assignments of error. Those numbered I to VII (Record pages 616-617) are directed to the court's overruling of the said exceptions, save that numbered I, (Record page 39), as to which no error is assigned, that defendants had filed to the master's report; and those numbered IX to XIV inclusive (Record pages 618 to 620) are directed to certain assumed holdings or findings of the court; those numbered XV to XVII inclusive (Record pages 620 to 622) are directed to the court's adopt-

ing or confirming the master's finding No. 11 and the conclusions of law Nos. 1 and 2 drawn by him; and those numbered XVIII to XX (Record pages 622-623) are directed against the court's decreeing specific performance of the contract, sued on, in favor of plaintiffs.

ARGUMENT.

We shall endeavor to follow the same order pursued by appellants in their brief.

I.

This is directed against the court's action in refusing to consider the exceptions filed by defendants to the master's report. This action was based on the fact that no objections or exceptions had been presented to the master but had in the first instance been presented to the court. Kimberly vs. Arms 129 U. S. 512, 524 and other Federal authorities were cited by the court in support of this ruling (Record page 52). There can be no serious contention against this ruling. In Tate vs. Holmes 76 Fed. 664, 667 this court by Judge Gilbert said:

"The testimony does not leave these conclusions doubtful in our minds, but, if it did, we would not be disposed to disturb the findings of the circuit court. It is the rule of practice of the supreme court and of the circuit courts of appeal that, where the trial court has considered conflicting evidence, and has made its findings thereon, the findings must be presumed to be correct, and will not be disturbed in the appellate court unless an obvious error has been made in the consideration of the

evidence. Tilghman vs. Proctor 125 U. S. 136, 8 Sup. Ct., 894; Kimberly vs. Arms, 129 U. S. 512, 9. Sup. Ct. 355; Bank vs. Rogers. 3 C. C. A. 666, 53 Fed. 776; Warren vs. Burt, 7 C. C. A. 105, 58 Fed. 101."

And in United States Trust Company vs. Mercantile Trust Company, 88 Fed. 152-153 it , through Judge Morrow, said:

"It will be observed that the reference, by the court below, to the special master, of the claim for taxes made by the intervener, the Southern Pacific Railroad Company, was not that of an ordinary reference to take and report testimony, but it was stipulated and agreed between counsel representing all the parties that the special master should take the proofs of the respective parties, and report the same to the court with his findings of fact and conclusions of law thereon. The effect of this stipulation was undoubtedly to constitute to a certain extent, the special master as the judge of the facts presented to him. The scope and effect of such a stipulation is tersely stated by Mr. Justice Brown, delivering the opinion of the United States Supreme court in Davis vs. Schwartz 155 U. S. 631, 636, 15 Sup. Ct. 237, 239 in the following language:

"As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his findings so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a circuit court in a case tried by the

court under Rev. Stat. Sec. 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but, so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding it must be treated as unassailable, citing Wiscart vs. D'Auchy 3 Dall. 321; Bond vs. Brown 12 How. 254; Graham vs. Bayne, 18 How. 60, 62; Norris vs. Jackson 9 Wall. 125; Insurance Co. vs. Folsom 18 Wall. 237, 249; The Abbotsford 98 U. S. 440.

See further, Kimberly vs. Arms, 129 U. S. 512,9 Sup. Ct. 355; Crawford vs. Neal 144 U. S. 585, 596, 12 Sup. Ct. 759; Furrer vs. Ferris 145 U. S. 132, 12 Sup. Ct. 821. So far therefore, as the findings of fact by the special master, under the stipulation referred to, are based upon conflicting evidence, or upon the veracity of witnesses, or so far as there is evidence consistent with the finding, they are conclusive and binding upon the court."

By reference to the exhaustive note to Kimberly vs. Arms 129 U. S. 512 contained in Volume 11 pp. 713-714 in Rose's Notes on the U. S. Reports it will be seen that the same ruling has been followed by other Federal courts.

To which may be added

Schwartz vs. Duss 103 Fed. 565

North American Exploration Co. vs. Adams 104 Fed. 407, 408.

Fidelity &c. Co. vs. St. Matthews Sav. Bank 104 Fed. 860.

W. U. Tel. Co. vs. American Bell Tel. Co. 105 Fed. 686.

With such an array of authorities as this it is not necessary to refer to appellants' citations of decisions which were made prior to the authoritative ruling of the Supreme Court in Kimberly vs. Arms.

Further the said exceptions of defendants are radically defective in that they are too loose and general. This subject was also discussed in Sheffield &c R. Co. vs. Gordon 151 U. S. 290 where the court refuses to consider exceptions obnoxious to that objection, saying, after quoting with approval Dexter vs. Arnold 2 Sumn. 125:

"The same rule was laid down in Story vs. Livingston 13 Pet. 359, 366 wherein the exceptions to the report of a master were held to be too general, indicating nothing but dissatisfaction with the entire report; and furnishing no specific grounds, as they should have done ,wherein the defendant had suffered any wrong, or as to which of his rights had been disregarded. The court observed that 'exceptions to a report of a master must state, article by article, those parts of the report which are intended to be excepted to.' The court cited with approval the case of Wilkes vs. Rogers 6 Johns. 566, wherein it was said that exceptions to reports of masters in chancery are in the nature of a special demurrer; and the party objecting must point out the error, otherwise the part not excepted to will be taken to be admitted. So in Greene vs. Bishop 1 Cliff. 186, 191, Mr. Justice Clifford held that 'general allegations of error, without pointing to any particulars, are clearly insufficient, for

the reason that, if allowable, the losing party might always compel the court to hear the case anew, and should that practice prevail, references such as made in this case would become both useless and burdensome, as they would only operate to promote delay and increase the expenses of litigation, without relieving the court from any of the labor of the trial or ever accomplishing anything of value to either party.' See also Stanton vs. Alabama &c. Railroad, 2 Woods 506, 518."

See also Cutting vs. Florida &c R. Co. 48 Fed. 506, cited *supra*, in which it was held, also, that the exceptions were too vague and indefinite to authorize the court to go behind the report. The exceptions here referred to will be found in the first report of the same case in 43 Fed. 746, 747.

With the law so firmly establishing this matter of practice, we think we could rest here, but our position is fortified by the fact that the lower court considered the merits of the case, after extensive argument, and decided that plaintiffs were entitled to a decree.

II.

Appellants' second contention seems to be based, as their brief pp. 30-31 shows, on the proposition that the circuit court erred in considering that the contract sued on herein was not "a severable contract and that the appellants had no right to demand payment for the cattle delivered on October 21st where they had not the ability to comply fully with the terms of the contract, requiring the delivery of 9000 head of steers and heifers,"

and they say that assignment of error numbered 9, 10, 11, and 14 were designed to present this ruling for review. By far the larger portion of their brief, pages 30 to 68, is devoted to this assertion, several subdivisions being made of the same and much is therein contained that we fail to see the applicability of to the present case. But as in this argument not only the contract, with appellees' rights thereunder, the findings of the master, the testimony generally, and the deductions of law to be drawn therefrom are discussed, perhaps we cannot do better than to present our contention and then consider that of appellants. The contract (Record pp. 12-17) is not a complicated one. It provides generally for the sale to appellees by appellant, the Home Land and Cattle Company, of all of a herd of cattle belonging to appellant company estimated to contain some 30000 head more or less; the cattle were to be gathered by said appellant and counted out to appellees *during the regular round-up season of* 1897 in train load lots but none were to be delivered or accepted after November 1st, 1897; no deliveries were to be made in less than such train load lots, and the steers, spayed heifers and dry cows were to be delivered at the same points *when marketable for beef, in the opinion of appellees*; the purchase price was fixed at $25 per head, *payable upon delivery of said cattle*; the party of the first part to said contract, the Home Land and Cattle Company, guaranteed therein to deliver *during the round up season* of 1897 not less than 9000 head of beef cattle (steers of three years old and up and spayed heifers of four years old and up) as a part of this herd and

in the event it failed so to do it agreed to pay $20 in cash for each head less than 9000 of such cattle; *at the end of such round-up season* it was also agreed there should be delivered and purchased 500 head of horses at $20 per head.

Under this contract deliveries commenced on July 11, 1897, were continued from time to time until October 22nd, such deliveries amounting to some 16,000 head. On October 18th appellants notified appellees that they would make a further delivery on October 21st of 820 steers, 631 stock cattle and 500 head of horses. The Home Land and Cattle Company finished its round-up for the season of 1897 upon October 22nd, and had not made any preparations for and did not intend to make any further deliveries under said contract on or before November 1st of that year (Finding 12, Record p. 33). This then being the final delivery for 1897 it became apparent to appellees that there would be a shortage in the beef cattle to the extent of 1895 head. They had received 7018 head of appellants and the report of 87 head of beef steers from the Board of Stock Commissioners payments for which latter however were not made by the Board until the end of the season (See testimony of Marlow, Record pp. 341, 362). On October 21st and 22nd appellants delivered of the animals then on hand the 820 steers and 113 stock cattle (Finding 11, Record p. 32) but refused to deliver the balance then on hand, 457 head of stock cattle and the 500 head of horses unless appellees gave a draft for the 933 which had been delivered. This appellees declined to do, but offered to pay

for said cattle and horses upon their delivery provided that appellants would pay or allow for such shortage of beef cattle at the agreed price of $20 per head; and they tendered the sum of $9,675 being the contract price for said 933 head of cattle which had been delivered and the 457 head of cattle and 500 horses still on hand, giving further credit for the 113 strays reported by the Board of Stock Commissioners, less such shortage of 1895 head of beef cattle at $20 per head, to-wit, $37,900; this appellants refused to accept and refused to deliver the 457 head of cattle and the 500 horses. Was this action on the part of appellees in accordance with law? It will be seen from the foregoing that the time in which appellants had agreed to deliver the 9000 head of beef cattle had expired. This was during the round-up season of 1897 (Contract Clause 9th, Record p. 15. See also clause 4th, Record p. 14) which appellants themselves had fixed as terminating with this delivery of October 21st and 22nd.

"They had not made any preparations for and did not intend to make any further deliveries under said contract Exhibit A on or before the 1st day of November 1897." (Finding 12, Record p. 33)

If we understand the position of appellants' counsel correctly, they claim that "the defendants had not contracted to adjust damages under the ninth clause of the contract until November 1st, 1897 and they could not be called upon so to do upon the 22nd day of October 1897." (Brief p. 36). This however is a misconception of the terms of the contract, one which it does not justify

and one which appellants themselves did not take at the time, for clause 10th of the contract (Record p. 15) provides for a delivery of the 500 horses at the *"end of the round-up season of* 1897," and such horses were prepared to be delivered, and in a way, were then offered by appellants to appellees. We cannot find any ambiguity as to this in the contract, but if there were one we understand the rule to be that the court will follow the construction placed on the contract by the parties themselves.

Leavitt vs. Windsor Land &c. Co (8th C. C. A.) 54 Fed. 439.

"We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract."

District of Columbia vs. Gallaher 124 U. S. 505, 510

and in

Topliff vs. Topliff 122 U. S. 131 it is said:

"If there were any doubt or ambiguity arising upon the words employed in the clause of the contract under consideration, they would be effectually removed by this practical construction continuously put upon them by the conduct of the parties for so long a period. 'In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling, influence. The interest of each generally leads him to a construction most favorable to himself, and when the

difference has become serious and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one.' Chicago vs. Sheldon 9 Wall. 50 54 per Mr. Justice Nelson."

See also 1 Beach Modern Law of Contracts sec. 721 and notes.

This sum of $37,900 was consequently then due from appellants to appellees. Should appellees have paid for the cattle and horses on hand at this final delivery of October 21-22 and then turned around and sued for the amount due them from appellants? We think not. It is a maxim that "The law never does nor requires idle acts." Robertson vs, Davenport 27 Ala., 574 is directly in point. There plaintiffs had contracted to deliver to defendant a certain quantity of hams at a stipulated price to be delivered during the season as defendant might want them and to be paid for on delivery. After a delivery of a part plaintiffs became unable to comply with the contract and defendant having refused to pay for those delivered plaintiffs brought suit for the price. It was held that if defendant knew the plaintiffs were unable to complete their contract he might refuse to pay and might recoup his damages. The instruction, which was there held erroneously refused, was to the effect that if plaintiffs, when the money for the bill sued on was demanded, had

ceased to have the ability to comply with their contract and defendant knew that fact, he might refuse to pay for the hams sued for and might recoup his damage.

See also Freeth vs. Burr, L. R. C. P. 208 and other cases cited in West vs. Bechtel (Mich.) 84 N. W. Rep. 71.

But aside from these citations it would seem impossible to add anything to the views expressed by the learned judge who tried this case. See Record pp. 58-59.

Now did the defendants, appellants, under the circumstances of this case have the right to refuse to deliver the balance of the stock on hand because of the alleged failure of plaintiffs, appellees, to pay for the 933 animals which had been delivered on October 21-22nd? It must be borne in mind that the delivery of the animals which defendants notified plaintiffs would be turned over on October 21st was not to consist of several distinct deliveries but only of one. This appears from the master's finding No. 10 (Record p. 32). It is borne out further by the fact that in all previous deliveries, even though the actual turning over of the animals consumed several days and consisted of distinct acts, the payment for the same was not made until after the receipt of all the animals (See testimony of Marlow, Record pages 393 394, 404 418, 420, 421, 422; and testimony of McNamara, Record pages 432, 435, 436, 485, 487, 488). We have then a case where a party in the midst of a delivery refuses to complete it unless his demand of payment for those already delivered is at once complied with and this in the light of a contract which provides for payment upon delivery in train load

lots. Doubtless the contract is an entire one.

"The fact that there were subordinate stipulations in regard to the dates of delivery and of payment would not break it up into separate contracts for each installment. It is sufficient to cite on this point the cases of Iron Co. vs. Naylor 9 App. Cas. 434 in the English House of Lords and Norrington vs. Wright 115 U.S. 188, 203,204. And the contract being entire as soon as the parties had entered upon its performance by partial delivery and payment, the mere failure of the vendee to make the subsequent payments would not of itself absolve the vendor from proceeding with the deliveries. It may be that a downright refusal to make payment, or other equivalent conduct evincing a purpose to renounce the contract, would entitle the other party to treat the contract as abandoned, and relieve him from the obligation to proceed further in its execution. Winchester vs. Newton 2 Allen 492. In respect to the obligation of the vendee to accept delivery of the goods under such a contract, where the vendor fails to comply with its stipulations with regard to the time and mode of delivery it was held in Norrington vs. Wright, supra, that he was entitled to insist upon a continued adherence to its terms. This was because they were of the substance of the thing contracted for. But the duty of the vendor, notwithstanding a mere failure of the vendee to make payment of money, not evincing a renunciation of the contract, stands upon a different ground, as pointed out in that opinion and results also, from a comparison of the actual decision in that case with other cases distinctly

involving the vendor's duty in those circumstances, among them the case of Iron Co. vs. Naylor, which it recognizes as authoritative."

Cherry Val. Iron Works vs. Florence I. R. Co. (6th C. C. A.) 64 Fed. 572.

It hardly seems necessary to add authorities sustaining the above but they are abundant. In Otis vs. Adams 56 N. J. L. 38, s. c. 27 Atl. Rep. 1093 the court said:

"The contract set out is a continuing contract of sale. It does not expressly nor by implication make payment for each lot delivered a condition precedent to the continuing obligation to sell and deliver. In such contracts default by one party will not release the other from his continuing obligation unless the conduct of the defaulting party evinces an intention on his part to abandon the contract, and no longer be bound thereby. Blackburn vs. Reilly, 47 N. J. L. 290, 1 Atl. 27; Trotter vs. Heckscher 40 N. J. Eq., 612,4 Atl. 83."

In Gerli vs. Poidebard Silk Mfg. Co., 57 N. J. L. 435, s. c. 31 Atl., 402 the court said:

"The other exception pressed by the defendant below is that the trial justice denied the right of the buyer to rescind the contract on the non-delivery of the first installment of silk. The general rule on this subject was thus laid down by this court in Blackburn vs. Reilly, 47 N. J. L.290, 54 Am. Rep., 159: 'In contracts for sale of goods to be executed by a series of deliveries and payments, defaults of either party with reference to one or more of the stipulated acts will not ordinarly discharge the other party from his obligation unless the conduct

of the party in default be such as to evince an intention to abandon the contract or design no longer to be bound by its terms.' In the case cited this rule was enforced against the buyer. In Trotter vs. Heckscher 40 N. J. Eq. 612 this court, and in Otis vs. Adams, 56 N. J. L. 38 the supreme court enforced it against the seller. That the conduct of the vendors in the present case did not evince an intention to abandon the contract, or not to be bound by its terms, appears beyond dispute."

In this latter case the brief of counsel so clearly states the principle that we avail ourselves of it. It is as follows:

"The vendee was not discharged from the obligation to take later installments because of the nondelivery of the first, unless the vendor had shown an intention to abandon the contract. The contract belongs to a class sometimes called "installment" or "continuing" contracts. Withers vs. Reynolds, 2 Barn. & Ad. 882; State vs. Davis 53 N. J. L. 144; Spicer vs. Cooper 1 Q. B. 424. In this class of cases the fundamental question is, whether the failure of one party to deliver or to pay for one installment discharges the other from his duty to accept or pay for later installments. Any breach may give the injured party a cause of action for damages, but every breach does not justify rescission. It is clear that one party cannot be considered as discharged from his duty to perform without the express or implied consent of the other. And if such consent is implied from a breach, it must be by reason of the fact that the performance in question was conditioned upon the performance

of that term of the contract which has been broken. A breach which in itself may be regarded as an invitation to an abandonment of the contract or a consent to the discharge of the other party from his obligations under it, must be one going to the essence of the contract, and not merely to some part of it, so that it may appear that the performance insisted upon was conditioned upon the performance which has failed. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration. Pordage vs. Cole 1 Wm. Saund. 319.

"The inquiry is: Is the value to the injured party of the residue of the contract, if performed, dependant upon the performance of the part which has been broken? If not, clearly such performance of the residue, plus damages for the particular breach, gives the injured party the equivalent of full performance. A failure to make one delivery or one payment is not a breach which goes to the essence of the contract, and, consequently, is not such a breach as may be considered an invitation to the injured party to abandon the entire engagement or to treat himself as discharged from all its obligations. Damages are a sufficient compensation. Blackburn vs. Reilly 47 N. J. L. 290, 54 Am. Dec. 159; Simpson vs. Crippin L. R. 8 Q. B. 17; Johnasson vs. Young 4 Best & S. 300; Brandt vs. Pawrence L. R. I. Q. B. Div. 344; Freeth

vs. Burr L. R. 9 C. P. 208; Mersey Steel & I. Co. vs. Naylor L R 9 Q B. Div. 648. L. R. 9 App. Cas. 434; Benjamin Sales, Bennett's Ed. 1892 Sec. 593a p. 547.

"By the deliberate adoption in Blackburn vs. Reilly, supra, of the doctrine thus established by the English courts, this court did for New Jersey what they had done for England, and the principle applicable to this class of cases is no longer open to debate.

Trotter vs. Heckscher, 40 N. J. Eq. 646,42 N. J. Eq. 258; Lehigh Zinc & I Co. vs. Trotter 43 N. J. Eq. 193; Otis vs. Adams 56 N. J. L. 38; See also Lucesco Oil Co. vs. Brewer 66 Pa. 351; Morgan vs. McKee, 77 Pa. 228; Scott vs. Kittanning Coal Co., 89 Pa. 231, 33 Am. Rep. 753; Winchester vs. Newton 2 Allen 492; Note of Mr. Landreth 21 Am. L. Reg. N. S. 398."

In Bogardus vs. N. Y. Life Ins. Co. 101 N. Y. 335, s. c. 4 N. E. 523-524 it is said:

"The failure of one party to a contract to perform some of its obligations, when it consists of a number of independent provisions, furnishes no excuse for non-performance to the other party. It is only when the non-performance is of a condition precedent, or where such party has wholly refused to perform, or has wholly disabled himself from completing a substantial performance, that the other party is relieved from performance, or a tender thereof. People vs. Empire Mut. Life Ins. Co., 92 N. Y. 109; Shaw vs. Republic Life Ins. Co.,69 N. Y. 293."

And see 1 Beach Modern Law Contracts sec. 123 where it is said:

"The leading case in point is the Mersey Steel Co. vs. Naylor, decided by the House of Lords, to the effect that the failure of the buyer to pay for the first installment of the goods upon delivery does not, unless the circumstances evince an intention on his part to be no longer bound by the contract, entitle the seller to rescind the contract and to decline to make further deliveries under it; and this case was, as to the point actually decided, cited with approval by the United States Supreme Court in Norrington vs. Wright;" See also section 849.

A case that presents several of the features found in the case at bar is Myer vs. Wheeler 65 Iowa 390, s. c. 21 N. W. Rep. 692. There plaintiffs contracted to sell and deliver to defendants 10 car loads of barley which plaintiffs had the right to deliver in lots of one or more cars at a time and draw on defendants for the amount of each separate delivery at the time it was made; one car was shipped and a draft drawn for the same; when the car arrived defendants found that it did not correspond to the sample and they refused to pay the draft, writing to plaintiffs to that effect and that they had given them credit for the car load at the reduced price of five cents per bushel. A few days after defendants further informed plaintiffs that they would pay the drafts drawn for future deliveries, but that they intended to retain the amount due on the car load received until all the barley should be delivered. Plaintiffs refused to assent to this, urged payment for the carload delivered and informed defendants they would deliver no more until tris was done, but expressed a willingness to deliver the

balance if this amount was paid. In the meantime there had been an advance in the value of barley and no further deliveries were made. The trial court found among its conclusions of law that the failure to pay for the car load delivered was not a rescission of the contract and did not entitle plaintiffs to rescind it. Judgment was entered for plaintiffs for the car load delivered but a reduction was made because of the inferior quality of the barley and defendants were awarded damages for the non-delivery of the nine car loads not delivered. The court in affirming the judgment said: "We are of the opinion, however, that the contract was not rescinded by the refusal of defendants to pay the amount due at the time when by its terms they ought to have paid it, and that plaintiffs were not thereby released from a performance of the unperformed portions of the contract. The contract was severable. When plaintiffs delivered the carload in question on the tracks the contract was thereby so far performed as that the rights and obligations of the parties with reference to that car load were fully established under it. They had then performed one of a series of acts which they undertook to perform and they were entitled under the contract to compensation for that act. They thereby performed a specific portion of their undertaking, and were entitled, by virtue of the contract, to a definite and certain portion of the consideration, and were in a position to enforce the payment by defendants of that portion of it, and their right in that respect was not at all dependent on the performance either by themselves or defendants of the other con-

ditions of the contract. Defendants were not in default as to the unexecuted portions of the contract. Nor did it appear that they ever would be in default as to them. They expressed a willingness to pay for the other nine carloads as they should be delivered, and there is no claim that they were not able to perform their undertaking in that regard. They did not refuse absolutely to pay for the carload which was delivered, but claimed the right to retain the price until the others should be delivered, and as security for the performance of the contract by plaintiffs. It was not understood when the parties entered into the contract that plaintiffs were dependent for the means to purchase the subsequent carloads on the money which they would obtain for those first delivered. Nor is it shown that they were so dependent. We think, therefore, that the circuit court rightly held that plaintiffs were liable for the damages occasioned by their failure to deliver the remaining carloads. The rule established by the decided weight of authority, both in England and this country, is that recission of a divisible contract will not be allowed for a breach thereof unless such breach goes to the whole consideration. Freeth vs. Burr, L. R. 9 C. P. 208; Mersey Steel & Iron Works vs. Naylor, L. R. 9 Q. B. Div. 648; Simpson vs. Crippin, L. R. 8 Q. B. 14; Newton vs. Winchester, 16 Gray 208; Winchester vs. Newton 2 Allen 492; Sawyer vs. Railway Company 22 Wis., 403; Burge vs. Cedar Rapids & M. R. R. Co., 32 Iowa, 101; Hayden vs. Reynolds, 54 Iowa, 157; S. C. 6 N. W. Rep. 180. See also the collection of authorities on the subject in the

note of Mr. Lucius S. Landreth to the case of Norrington vs. Wright, 21 Amer. Law Reg. 395."

The latest case that we have seen on the subject is that of West vs. Bechtel (Mich.) 84 N. W. Rep. 69, decided November 13, 1900. The facts in that case also present many of the features of this one. It was a case for the sale of a lot of wood, deliverable in carloads, payment to be made on delivery. Three cars were shipped and two paid for, defendant thereupon refused to deliver any more. There was nothing evincing an intention on plaintiff's part not to perform the contract and they demanded delivery of the remainder. The action was brought to recover damages because of defendant's refusal to deliver. Held, that plaintiff's mere refusal to pay for the third carload until more was delivered was not such a breach of the contract as would warrant defendant in repudiating the entire contract, and, he was therefore liable for the non-performance. This case contains an exhaustive review of the cases English and American and in our opinion leaves but little more to say on that subject.

In the light of the law as laid down by the authorities it must be concluded that the mere failure to pay for the animals delivered on October 21st and 22nd, even if appellants were then entitled to demand the same, did not amount to a breach of the contract on the part of McNamara and Marlow nor did it absolve the appellants from the duty to continue the deliveries as they had contracted to do. Appellants, then, and not appellees are the parties that broke the contract,

and their refusal to go ahead with it was wrongful. Findings Nos. 11, 21, 22, 23 and conclusions of law Nos. 1 and 2 are consequently true and proper.

Was there any evidence of an intent on thepart of appellees to be no longer bound by the contract? There is not a word showing any such intent, but much to show the contrary, (Finding No. 14, Record p. 34) and if more were needed, then, the fact of the bringing of this suit to enforce the contract, practically simultaneously, with the breach on the part of appellants shows conclusively that the appellees intended it to remain in force.

We have carefully read the article referred to in appellants' brief, from 14 Harvard Law Review, 317 and find nothing in it militating against the views heretofore expressed but much in support of them, for taking as a point of departure the statement that "whether the reason he discloses for his prospective failure to perform is because he cannot or because he will not seems wholly immaterial" and which is repeated on page 440 of that article as follows, "A distinction between ability and willful intention not to perform is not of practical value." and the correctness of theis statement appellants seem to concede in their brief, then Prof. Williston's deductions on pages 427 and 434 of that article, to-wit: "If it is clear that one party to a contract is going to be unable to perform it the other party should be excused from performing. The excuse is the same as in cases where a willfull intention not to perform is manifested. The party aggrieved is not going to get what he bargained for in return for his performance. It is immaterial to

him, and it should be immaterial to the court whether the reason is because the other party cannot or because he will not do what he promised. Even if the prospective inability is due to *ris major* this should be true." "Every consideration of justice requires that repudiation or inability to perform should immediately excuse the innocent party from performing, nor is any technical rule violated if the excuse is allowed. But it does not follow from this that he has an immediate right of action. It is a consequence of allowing such an excuse that when he brings an action he shall not be defeated by reason of the fact that he himself has not performed, since that failure to perform was excused by the defendant's fault" become peculiarly applicable to the fact of this case, for even though appellees were in duty bound to pay for the cattle received still this performance was excused as soon as the inability on the appellants' part to deliver the full 9,000 head of steers became an ascertained fact. This was not at some period anterior to the final delivery of October 21st and 22nd as assumed by counsel in their brief, but upon October 22nd as the master explicitly finds (Finding No. 13, Record p. 34); and as the delivery of the 9000 head was to have been made "during the season of 1897" (Contract clause 9th, Record p. 15) a valid claim to the stipulated amount for the shortage then arose, and by the terms of the clause in question became then immediately payable and consequently this action should "not be defeated by reason of the fact that he himslf has not prformed,since that failure to perform was excused by the defendant's fault." With

this view of the case section 1936 of the Civil Code of Montana:

"If a party to an obligation gives notice to another before the latter is in default that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former" seems to coincide. In this case we have the equivalent of notice from appellants that they would not perform the obligation on their part in an important particular, this before it is even claimed appellees had failed to do anything, such performance was due on October 22nd, consequently we are entitled to enforce the obligation without performing or offering to perform any condition on our part in favor of appellants. But upon this strict right, appellees never insisted, all they asked for was the fair and equitable adjustment of the two claims, that in favor of themselves and that in favor of appellants. Whether the inability to deliver the full 9000 head of beef steers arose out of the non-existence of that number is not material. The parties as they might lawfully do provided for that contingency by the clause in question and as the Supreme Court of the United States in Chicago &c. Ry. Co. vs. Hoyt, 149 U. S. 14 says:

"There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the non-performance, and such construction is to be

put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act of the promiser."

And section 2324 of the Civil Code of Montana provides:

"Any property which, if in existence, might be the subject of sale may be the subject of an agreement of sale, whether in existence or not."

It was clearly within the contemplation of the parties to this contract that it might be impossible for the Cattle Company to deliver the stipulated number of beef cattle, it therefore agreed to deliver such number as it could, and for all less than the stipulated number to do something else, to-wit: to pay $20 per head. It is immaterial whether the entire number of 9000 head were in existence or not. Under no view of clause 9 can it be said that it was impossible to comply with its terms.

We now take up the brief of the appellants. In the light of the authorities cited in the first part of this brief it is idle to discuss whether the delivery of October 21st and 22nd was a final one for that year. That is one of the issued raised by the pleadings. All the witnesses for the appellees testified to that effect, and though the testimony of appellants conflict therewith, the masters findings in that regard is conclusive.

There was no election on the part of appellees to waive the beef shortage. They were never called on to do so. The mere fact of surmise or anticipation on their part that there would be such a shortage coupled with the re-

ceipt of subsequent deliveries would not amount to such an election.

Appellees have never rescinded the contract nor sought so to do. Nor could they have done so because of a shortage. Clause 9th of the contract gave them no such remedy. That provides for a payment of $20 for each beef animal less than the stipulated number of 9000 head. In this it is so entirely different from the contract involved in McGillin vs. Bennett 132 U. S. 445 as to excite surprise that that case should be cited as applicable to the present one. Nor does said clause contain any penalty. It is nothing more than a guaranty on the part of the Home Land and Cattle company that the number of cattle in the herd sold to appellees should amount to 9000, and an agreement on its part to pay $20 per head for any less number, and the exaction of a bond to that effect or the insertion in the contract of a clause that they might retain enough to guard against any possible shortage would have added nothing to the legal effect of the clause as it now stands.

Much of the brief of appellants is based on a supposed repudiation by appellees of the contract. This is so beyond the facts as not to deserve more than a passing remark. Appellees have neither rescinded, abrogated nor broken the contract (See Findings Nos. 11, 21, 22 and 23 and conclusions of law Nos. 1 and 2). We fail to see then, the applicability of the authorities cited on pages 43 to 50 inclusive of appellants' brief, to the facts of this case. We think we have sufficiently shown that appellants

were in default, and that the master correctly so found, we consequently pass this subdivision of the brief.

In the light of the fact, as shown by the testimony, that appellants after their wrongful refusal to deliver them, had run the horses out of the jurisdiction of the state court, it is passing strange for counsel to assert that they "held these cattle in the hope that appellees would retract their decision and go on with the contract." The observations on pages 53 to 58 of said brief are but a repetition in an amplified form of the assertion that appellants performed their obligation but appellees failed to perform theirs. It is not true that appellants could make deliveries as they saw fit, for the contract provides for deliveries in train load lots, this is defined as being in the neighborhood of 500 head, as low as 476 and as high as 639 head, according to the cattle (Testimony of Marlow, Record p. 363.

Appellants have cited quite a number of authorities in support of their contention that the mere fact of a failure on the part of a purchaser to make a payment on such a contract as this one entitles the vendor to rescind the contract on his part. Do they bear it out? Stephenson vs. Cady 117 Mass. 6 is certainly not in point, for from appellants' own quotation from that case (Brief p. 60.) the failure to pay was construed as "*something more than a refusal to pay for a single delivery. It was broad enough to be treated as a general refusal to make any further payments.*" And so in King vs. Faist 161 Mass., 449, s. c. 37 N. E. Rep. 456, the rescission there was held justified not for the

failure to pay, but because the purchaser insisted on a condition not contemplated in the contract and refused to make further payments unless it was complied with. That that court is against appellants' contention is apparent from the language of the decision cited: "It is true that they stated also in the same letter, 'you returned our draft unpaid which cancels all other contracts, *a statement which considered as a proposition of law was, no doubt, erroneous.*"

In Hayes vs. City of Nashville, 80 Fed., 641 the contract contained a provision that if the vendee failed "to take and pay for any installment of bonds as above provided, when delivered then at the option of the City of Nashville this contract may be declared null and void in all its provisions." That the court did not intend any such conclusion as appellants claim is apparent on page 647 where Cherry Valley Iron Works vs. Florence Iron River Co., 64 Fed., 569 is cited with approval. This case, then, is not in point.

In Wharton vs. Winch 104 N. Y. 287, s. c. 35 N. E. Rep. 589 the contract was for railroad work. The court said:

"In view of the structure of this contract, it would seem to be clear that the mere failure of the defendant to make punctual payment of an installment due according to its provisions was not such a breach of the entire contract as to permit the plaintiff to refuse to proceed further under it, and recover damages for the profits which he would have earned had the contract been

fully performed on his part. In the able and elaborate brief submitted by the learned counsel for the appellant, our attention has not been called to any case where the contrary of this proposition has been maintained. While the question does not seem to have been the subject of frequent discussion in this state authority is not wanting to support this view. In Moore vs. Taylor 42 Hun. 45 the plaintiff sought to recover prospective profits upon the failure to pay an installment under a contract for railroad construction similar in its important features to the one before us; and it was held by the general term of the Fifth Department, Judge Bradley delivering the opinion of the court, that mere default in the payment of an installment when it becomes due is not such a denial of the right of contract, or to continue in the performance of the service, as in legal effect to constitute a breach of the entire contract. Such a failure of itself is not equivalent to a refusal on the part of the defendant to be further bound by the contract, or to an abandonment of its provisions by him. This rule was clearly recognized by this court in Nichols vs. Steel Co., 137 N. Y. 471, 33 N. E. Rep. 561, where it was held that under a contract to deliver iron in specified portions monthly, the delivery for each month to be paid for on the 27th of the following month, the refusal to be further bound by the terms of the contract or to accept further deliveries and to give notes already demandable, and to give any more notes at any time or for any purpose in the future, or to pay moneys at any time which were eventually to be paid under the contract—that all these things

constituted a breach of the contract as a whole, and gave a present right of action to recover damages sustained thereby."

Raabe vs. Squire 148 N. Y., 81, s. c. 42 N. E. Rep. 516, was an action to establish a lien for work and labor. It has no bearing whatever, as the slightest examination of it will show.

Keeler vs. Clifford (Ill.) 42 N. E. Rep. 248 was an action brought by the contractor for an amount due on a grading or levelling contract. There is nothing in it that is applicable to the facts of this case.

DeLoach vs. Smith (Ga.) 10 S. E. Rep., 436 was a suit by the vendor against the purchaser, the contract and the court's views of the law applicable to the facts appear from the following:

"The third ground of the motion, which was relied upon here for reversal of the judgment of the court below, is in substance, that the court erred in charging that if after the plaintiffs had delivered 13,000 feet of lumber, the defendants refused to pay for the amount thus delivered, and failed to furnish any other specifications for lumber to be sawed, such non-performance by the defendants of their part of the contract was a breach thereof, and the plaintiff could recover. We see no error in this charge. It seems to us to be a sound proposition of law. If the defendants made a contract with the plaintiffs and agreed to take 100,000 feet of lumber, and to give specifications for sawing the same, and the plaintiffs furnished a part of it, and the defendant refused to pay therefor

when it was due, and to furnish additional specifications, it was a breach of the contract and the plaintiffs would be entitled to recover whatever damages they may have sustained by reason of such breach." This case then, is not in point.

Armstrong vs. St. Paul &c. Co., (Minn.) 49 N. W. 233 and 50 N. W. 1029, was a case "where the purchaser notifies the seller that he will not pay the contract price for the property, if delivered, but only a less price, it amounts to a repudiation of the contract, and absolves the seller from the duty of delivering the property; and he may have his action for the loss of profits on the sale." On the re-hearing the decision was adhered to. That this case does not support appellants' contention appears from the following:

"It is doubtless true that there may be acts of default in the performance of the strict terms of a contract which would not evince any intention to repudiate its obligations, and which consequently the other party would have no right to treat as a repudiation. An example of this is Iron Co. vs. Naylor L. R. App. Cas. 434 cited and relied on by plaintiffs. But this is clearly not such a case."

Bowdish vs. Briggs 39 N. Y. S. 371 was on a contract for personal services, the employee suing the employer. The plaintiff quit work because of a controversy over what he was entitled to get under the contract. Held that defendant could not defeat recovery for the value of the work done where plaintiffs failure was caused by defendant's refusal to carry out his part of the contract.

Ferree vs. Wilson 19 N. Y. S. 209 was on a contract for advertising. Held that defendant was not entitled to a non-suit because plaintiff's evidence showed non-performance on his part, where it also appeared that defendant made the first default.

Cunningham vs. Ry. Co., 18 N. Y. S. 600 was upon a contract for railroad work; held that where defendant had failed to meet the payments provided for in the contract plaintiff was justified in abandoning the work. In none of them was the doctrine of Mersey S. & I. Co. vs. Naylor *supra* and the authorities heretofore cited discussed. Nor was it in Robson vs. Bohn 27 Minn., 333. Nor in Evans vs. C. & R. I. R. Co., 26 Ill., 189. We fail to find the case of Miller vs. Sullivan (Tex.) 35 S. W. 695; there is a case under that title on page 362 but the only point there considered was that of who are proper parties defendant.

Wherein section 1955 of the Montana Civil Code has any bearing on this question we fail to see.

As we have seen from the foregoing authorties the doctrine of Mersey S. & I. Co. vs. Naylor, *supra*, has met with the acceptance and approval of all the American courts, where it came under review, and so far as the English courts are concerned we have but to call attention to 2 Benjamin on Sales (Kerr's Am. Ed.) section 793 where that case is considered after a review of the English cases which preceded it, and where the learned author says: "It is submitted that this decision must be taken to settle the law upon this subject."

We submit that this branch of appellants' brief

(pp. 30-68) has been shown to be not in accordance with the facts of the case nor with the law.

III.

Appellants' brief, third subdivision asserts that "respondents never tendered performance" and it is said that it is based upon the assignments of error numbered XV. and XVI. It was not incumbent on appellees to make any tender of payment at all. Payment under the contract was not to precede delivery but to follow it. As we have seen it was the duty of appellants to make deliveries in accordance with the contract, and failing so to do and in insisting upon payment before delivery, as the findings and testimony show they did (Record pp. 595, 598) was an unwarrantable demand upon their part with which appellees were in nowise bound to comply. The offer that was made by appellees on October 22nd was far more than the law required of them, and the six reasons advanced in appellants' brief (pp. 69-70) in criticism of it are wholly untenable. Only one of them, that numbered 4, need be here noted. It is not true that the exact number of strays shipped to market was not then known. Finding 11 designates it as 113 which is justified by the testimony of Marlow (Record pp. 341, 362) to the effect that they had then received 113 strays of which 87 were beef cattle. Since October 21st enough further strays were received to make the total number 148 head (Record p. 362.). This is uncontradicted, and it is from it that the master made his finding No. 8.

Appellants next attack clause 9th of the contract claim-

ing that it is an attempt to fix the amount of damages for a breach of the contract in anticipation thereof and within the purview of sections 2243 and 2244 of the Montana Civil Code. This strikes us as a total misconception of the clause in question. The contract price of all animals delivered was $25 per head, to say then, that the $20 per head which clause 9th provides to be paid for the shortage in the number of beef cattle which the Home Land and Cattle Company guaranteed its herd contained, is at least far fetched. We can hardly credit counsel as being serious, if they contend, that in the event of a breach of this contract by appellants appellees would be limited in their recovery to a value of $20 only for any and all animals agreed to be delivered. And yet if this is not their contention we fail to understand them. But aside from this let us see what was intended by this clause 9. The master and the trial court have both found that it is a material part of the contract and that plaintiffs relied upon the guaranty and agreement therein contained (Record p. 37.) McNamara in his testimony (Record p. 430) says that a guaranty of 9000 head of steers in a herd of cattle would make it worth more than if the 9000 steers were not there; and that they agreed to take the cattle at the price named, $25 per head, if the Home Land and Cattle Company would guarantee having 9000 head of such cattle, or that they would take the cattle without this guarantee at $23 per head; and that this guarantee represented the difference between $25 and $23 per head. Mr. W. F. Niedringhaus, the president of

the Home Land and Cattle Company testified on this point as follows:

"Q. And further in these negotiations had at that time, did you not state to McNamara and Marlow that you had at least 12,000 head of beef cattle in this herd of yours—steers of three years old and upward and spayed heifers?

A. I did. It was our impression we had that many.

Q. And it was only after a great deal of dickering back and forth that you came to the figures of 9999 head, was it not?

A. Yes sir.

Q. Now, the fact of having a certain number of cattle, beef cattle in your herd, was one of the inducements that were held out to McNamara and Marlow to induce them to pay such a large price, wasn't it?

A. That is the way I understand it; yes, sir." (Record p. 99.)

From this it is clear that clause 9th is not a fixing of damages for any anticipated breach of the contract. The Cattle Company through its officers supposed it had 12,000 head of beef cattle, and was willing to guarantee 9,000 head in order to induce McNamara and Marlow to pay for the animals in the herd $2 more than they were worth at the time the contract was made, if such number of beef steers was not in it. For it, then, to come in now and say that this material inducement held out by it, is void, would in the language of Lord Macauley "shock the moral sensibilities of a den of robbers." No

such contention can be entertained in a court of justice. Appellants are estopped from asserting it.

2 Pomeroy's Eq. Juris. secs. 802, 805.

What the clause itself means is too plain for extended argument. It was clearly within the contemplation of the parties to the contract that it might be impossible for the Home Land and Cattle Company to deliver the stipulated number of beef cattle, the Cattle Company consequently agreed to deliver as many of them as it could and for such number as should fall short of the stipulaed 9,000 head to do something else, i.e. to pay $20 per head. Suppose the agreement had been instead of paying the specifled number of dollars to deliver something else e. g. a horse for each steer less than 9,000, would appellants contend, then, that such agreement was a penalty or a fixing of damages? We think not. In the case from California (90 Cal. 110) which appellants cite, no such rule was announced. That case simply holds that an agreement of a certain amount as liquidated damages in the event of the breach of the contract was bad under the statute. It has no application to the circumstances of this case. Here we are not suing because of any shortage of the kind of animals mentioned in said clause 9 but to compel the performance by appellants of the contract as to the 457 head of stock cattle they refused to deliver to us on October 22, 1897. But aside from these considerations it must be admitted that the agreement contained in said clause is a promise, an undertaking, that it is founded on a consideration and consequently if not fulfilled appellees should recover therefor, they

consequently had the right to offset what they were entitled to thereunder against any sum they owed appellants for the animals delivered on October 21st and 22nd for which the cash had not been paid. It has a bearing in this case solely on the proposition that appellants were wrong in demanding payment for the full amount without taking this claim into consideration, and that the refusal to go ahead with the deliveries was not warranted by this action on the part of the appellees.

This, however, has been fully gone into in the second subdivision of this brief. The discussion of the question of penalties and liquidated damages contained in appellants' brief (pp. 71-79), although interesting, has no application whatever to this case.

IV.

The fourth subdivision of appellants' brief (pp. 79 et seq.) discusses the right to a specific performance of the contract. Although it is true, as claimed, that appellants did not agree to deliver any specific number of stock cattle during the year 1897 as to those that they had actually rounded up and had ready for delivery at the designated point there was the express agreement. It is consequently an unwarrantable aspersion to say, as counsel do, that in decreeing the delivery of these stock cattle "the court is only doing so to enable the respondents to set off against the purchase price of one class of cattle the damages sustained by failure to deliver another grade." So far as we are concerned we have here the property, 457 head of stock cattle, specifically de-

scribed and in hand, which appellants had solemnly agreed to deliver to us. The horses which they also agreed to deliver at the same time and place, need not be considered because they had been driven by appellants themselves out of the jurisdiction of the state court and beyond the reach of its officers. Some of the elementary rules of the law relating to specific performance of contracts are the following:

"When the court is able to decree part of the contract, the plaintiff may take specific performance of that part and waive the rest, or he may claim damages or compensation for the part of which he cannot have specific performance."

5 Lawson's Rights & Remedies, p. 4268. sec.2606.

"Equity has jurisdiction where the exact performance of the contract in point of time or title, quantity or quality or in some other matter cannot be had, and it is sought to enforce such performance as may be had with compensation, if necessary, for deficiency in the performance."

5 Lawson's Rights & Remedies, p. 4274, sec. 2610.

"A purchaser is entitled to specific performance against the vendor so far as the latter may be able to complete the contract, with compensation for any deficiency."

5 Lawson's Rights & Remedies, p. 4276, sec. 2612.

We understand the modern equity rule to enlarge rather than restrict the jurisdiction whereby courts of equity

undertake to compel the specific performance of contracts concerning personalty.

2 Beach on Contracts Sec. 955.

Pomeroy on Spec. Perf. of Contracts (2nd Ed.) Sec. 15.

22 Am. & Eng. Ency. of Law p. 989.

And the rule is laid down by Mr. Beach, 2 Beach Modern Equity 598, as follows:

"While in general a court of equity will not take upon itself to decree specific performance where chattel property alone is concerned its jurisdiction to do so is no longer to be doubted, and no good reason exists against the exercise of the jurisdiction in any case where compensation in damages would not furnish a complete and satisfactory remedy. The rule that such contracts are not usually enforced specifically as are contracts which relate to real property does not rest upon any ground of any distinction between the two classes of property other than that arising from their character. Contracts which relate to real property can necessarily be satisfied only by a conveyance of the particular estate or parcel contracted for, while those which relate to personal property are often fully satisfied by damages which enable the party injured to obtain elsewhere in the market property precisely similar to that which he had agreed to purchase. The distinction between real and personal property is entirely subordinate to the question whether an adequate remedy can thus be afforded. If from the nature of the personal property

it cannot, a court of equity will entertain jurisdiction to enforce the contract."

See authorities cited in foot note No. 1.

And in the case of Frue vs. Houghton, 6 Colo., 319 the rule is stated as follows:

"That courts of equity have jurisdiction to decree the specific performance of agreements whether relating to real or personal property is well settled. It is true that special circumstances must exist entitling the party to an equitable remedy in order to authorize the exercise of the jurisdiction, but the authorities agree that its exercise does not depend upon any distinction between real and personal estate. The ground of the jurisdiction when assumed is that the party seeking equitable relief cannot be fully compensated by any award of damages at law; when therefore an award of damages would not put the plaintiff in a situation as beneficial as if the agreement was specifically performed, or where compensation in damages will fall short of the redress to which he is entitled, a specific performance may be decreed. The exercise of the jurisdiction depends upon the fundamental rule of equity jurisprudence that there is not a plain, adequate and complete remedy at law."

And in the case of Gottschalk vs. Stein, 69 Md., 51, s. c. 13 Atl., 625, the rule is stated as follows:

"As a general rule courts of equity, it is true, will not decree the specific performance of a contract for the sale of goods and chattels, for the reason that an action at law for a breach of the contract affords as complete a remedy for the purchaser as a delivery of the goods, inasmuch as

with the damages thus recovered at law he can purchase the same quantity of like goods. Having thus an adequate remedy at law there is no ground for the interference of a court of equity, but we take it to be well settled that where there is an agreement to buy a specific chattel for a specific purpose, and this purpose can only be answered by the delivery of the chattel itself, or where, from the nature of the subject matter of the agreement, the measure of damages must necessarily be uncertain; or where damages will not be as beneficial to the purchaser as the performance of the contract, equity will interfere and decree the specific performance of the contract, because in such cases, an action at law for a breach of the contract will not afford the purchaser a complete and adequate remedy. In the language of Lord Selborne, 'the principle which is material to be considered is that the court gives specific performance instead of damages only when it can by that means do more perfect and complete justice.' (Wilson vs. Railway Co., 9 Ch. App. 279) or, in other words, where damages at law fall short of that redress to which one is fairly and justly entitled. Doloret vs. Rothschild 1 Sim. & S. 590; Burton vs. Lister, 3 Atk. 385; White vs. Schuyler 1 Abb. Pr. (N. S.) 300; Ashton vs. Corrigan, L. R. 13 Eq. 76; Robinson vs. Cathcart, 2 Cranch, C. C. 590; Cutting vs. Dana, 25 N. J. Eq. 265."

And again, note the language at the bottom of page 626 of 13 Atlantic Reporter as follows:

"Courts of equity decree the specific performance of contracts not upon any distinction between realty and

personalty, but because damages at law may not in the particular case afford a complete remedy."

And see also the language of the Supreme Court of California in McLaughlin vs. Piatti 27 Cal., 463-464:

"As a general rule, a bill in equity does not lie to enforce the specific performance of a sale of personal property. There are exceptions to the rule, * * * * * The equitable jurisdiction to enforce specific performance in this class of contracts is not based either in whole or in part upon the accident of insolvency, but upon the general principle or truth that in the excepted cases there can be no adequate compensation in damages at law, the solvency of the defendant being given. This consequence sometimes results from the fact that the thing bargained for is of unusual distinction or curiosity, or from the fact that the commodities sold or contracted for are so related to the situation orto the business arrangements of the purchaser that non-fulfillment would greatly embarrass and impede him in his plans and prospects—threatening or involving a loss of profits which a jury could not correctly estimate; or to cases where the contract is not to be presently executed, and the like. (Taylor vs. Neville cited in 3 Atk. 384; Adderly vs. Dixon, 1 Sim. and S.; 1 Stor. Eq. Jur. Sec. 718.")

And in the case of Senter vs. Davis, 38 Cal., 453 the Supreme Court of California uses the following language:

"The jurisdiction of a court of equity to decree specific performance, does not turn at all upon the question whether the contract relates to real or personal property, but altogether upon the question whether the breach

complained of can be adequately compensated in damages. If it can, the plaintiff's remedy is at law only; if not, he may go into a court of equity, which will grant full redress by compelling specific performance on the part of the defendant. Accordingly, while it is a general rule that contracts for the sale and transfer of personal property will not be specifically enforced, yet, if there are circumstances in view of which a judgment for damages would fall short of the redress which the plaintiff's situation demands, as that by non-performance he will be greatly embarrassed and impeded in his business plans, or involved in a loss of profits which a jury cannot estimate with any decree of certainty, equity will decree specific perfo rmance."

A valuable case on the subject under discussion is that of Equitable Gas Light Company vs. Baltimore &c., 63 Md., 285, where it is said:

"It is certainly a well recognized general principle by courts of equity that they will not decree specific performance of contracts for the sale of goods and chattels, not, however, because of the nature of the property, the subject matter of the contract, but because damages at law, calculatd on the market price of the goods and chattels bargained for, furnish, in ordinary cases, an adequate redress to the purchaser for the breach of the bargain by the vendor.

2 Sto. Eq. sec. 717; Sullivan vs. Tuck, 1 Md. Ch. Dec., 63.

But there are many exceptions to this general rule, founded principally upon the inadequacy of the remedy

at law in the particular case, or the special and peculiar nature and value of the subject matter of the contract. In the 2nd Volume of Story's Equity, sections 718 to 725, the general rule, with the exceptions thereto, will be found fully discussed with reference to all but the very recent cases. And among the cases forming exceptions to the general rule, there is one stated of a contract for the sale of 800 tons of iron, to be paid for in a certain number of years by installments, for which specific performance was decreed; for the reason, as supposed by the author, that, under the particular circumstances of the case, there could be no adequate remedy in damages at law; for the profits upon the contract being dependent upon future events could not be correctly estimated in an award of present damages. And so in the case put by Lord Hardwicke, in the case of Buxton vs. Lister, 3 Atk., 385, and repeated by Judge Story, as an apt illustration; a man may contract for the purchase of a great quantity of timber, as a ship carpenter, by reason of the vicinity of the timber, and this may be well known and understood on the part of the seller; and in such case a specific performance would seem to be indispensable to justice. And so Mr. Pomeroy in his excellent work on Specific Performance of Contracts, sec. 15, p. 20, states it as a well settled principle in the doctrine of specific performance, that a contract for the sale and delivery of chattels which are essential in specie to the plaintiff, and which the defendant can supply, while no one else can, will be specifically enforced. In such case the plain-

tiff could not be indemnified by any such amount of damages as he could recover at law."

In Manton vs. Ray (Rhode Island 1894) 29 Atl. Rep. 998, it is said:

"1. The allegation of a bill for specific performance of a sale of stock that its value is not easily ascertainable presents a case where remedy at law is inadequate.

2. It is sufficient for a bill for specific performance of a sale of stock to allege that complainant cannot obtain the stock elsewhere than of respondent, without alleging that the stock was not on the market, or that complainant has made effort to obtain other such stock."

And in Rothholz vs. Schwarz 46 N. J. Eq. 477, 19 Atl. Rep. 317:

"The jurisdiction of this court to decree specific performance of contracts for sale of chattels is as well settled as it is for those of the sale of realty, and is based upon the same grounds, namely, the inability of the courts of law to give such remedy; and so the question whether the court will, in a particular case, exercise its jurisdiction, is to be determined upon the same considerations in both cases, the most important being whether there is a full, complete and adequate remedy at law. And the reason why the jurisdiction is seldom exercised over sales of chattels is that the remedy at law, in such cases, is usually adequate and satisfactory. Cutting vs. Dana 25 N. J. Eq. 265, and cases there cited. Pom. Spec. Perf. Secs. 9-20. Wat. Spec. Perf. Secs. 16-17 * * * * * * "The only question then is, had the complainant in this case

such a complete and adequate remedy at law as that this court should decline to exercise its jurisdiction and give him expressly what he bargained for? It is proper here to remark that, when the defendant intends to ask the court not to exercise its jurisdiction for the reason that the remedy at law is sufficiently adequate, he should take the objection in his answer. Ordinarily, unless so taken, it will be deemed to have been waived. The objection to the exercise of the admitted jurisdiction of the court on the ground that there is an adequate remedy at law differs from an objection for want of jurisdiction, which may be taken at any time. Here the jurisdiction is indisputable, the only question being whether the court ought to exercise it. But, looking at the case as if the objection had been taken in time, viz., a suit to recover the balance of the unpaid purchase money, or its equivalent,—damages for not executing the securities stipulated—would not be an adequate remedy, for the reason that the defendant has no property outside of the goods sold; and during the pendency of that suit the complainant would be destitute of any control over, or lien upon, the stock of goods, and defendant might before judgment, move them beyond the jurisdiction of the court." See also Johnson v Brooks 93 Ky. 344 Express Co v. Railroad Co. 99 U.S. 200

In addition to these authorities attention should be called to the statutes of Montana concerning the specific performance of obligations. Doing this we cite section 4410 of the Montana Civil Code which reads:

"Except as otherwise provided in this article the specific performance of an obligation may be compelled.

1. When the act to be done is in the performance wholly or partly of an express trust.

2. When the act to be done is such that pecuniary compensation for its non-performance would not afford adequate relief.

3. When it would be extremely difficult to ascertain the actual damage caused by the non-performance of the act to be done; or

4. When it has been expressly agreed, in writing, between the parties to the contract, that specific performance thereof may be required by either party, or that damages should not be considered adequate relief."

We think that the case at bar directly falls within subdivisions 2 and 3 of said section and of section 4415 which reads:

"A contract otherwise proper to be specifically enforced may be thus enforced, though a penalty is imposed, or the damages are liquidated for its breach, and the party in default is willing to pay the same."

Again, Civil Code, section 4416 reads:

"The following obligations cannot be specifically enforced:

1. An obligation to render personal service, or to employ another therein.

2. An agreement to marry or live with another.

3. An agreement to submit a controversy to arbitration.

4. An agreement to perform an act, which the party

has not power to perform lawfully when required so to do.

5. An agreement to procure the act or consent of the wife of the contracting party, or of any other third person; or

6. An agreement the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable."

Under a familiar rule of statutory construction,- *expressio unius* &c. such an obligation as the one at bar not being included in those enumerated in said section 4416 it should follow that this particular case is one that might and can be specifically enforced.

Applying these principles to the case at bar we find that the contract was one extending over the years 1897 and 1898; that the cattle mentioned in the contract were of a peculiar value to the appellees in that they were depended upon by them to furnish cattle under beef contracts to the government Indian Reservations; and in the further fact that the appellants had made food provisions to winter the cows and young stock to fill contracts and depended upon the cattle described to fill the same.

We find from the uncontradicted testimony that the animals could not have been procured from any other source. (Testimony of Marlow, Record pp. 355, 388 and of McNamara pp. 471, 473.) We find, also from the uncontradicted testimony that it would not be possible to determine or estimate in money the damages that appellees would have sustained by being deprived of the animals in question for the uses above mentioned.

(Testimony of Marlow, Record pp. 395, 412, 414, 415, and of McNamara, p. 474.)

It is difficult to imagine a case which presents so many features for the invocation of the relief of a court of equity as this one.

Again it must be remembered that the granting of a decree for specific performance is much in the sound discretion of the trial court.

5 Lawson's Rights & Remedies p. 4262, sec. 2600.

It is only because of an abuse of this discretion that the appellate court will interfere. It is patent from the opinion of the learned trial judge that he did not abuse this discretion. 105 Fed. 202.

The only grounds urged by appellants why specific performance should not be decreed are:

1st. That a court of equity has no jurisdiction to decree specific performance of a contract for the sale of chattels.

2nd. That the contract here, as they say, contains a penalty for the breach thereof;

3rd. That to secure the relief plaintiffs must show a performance on their part of the obligations thereof.

The first one, in the light of the authorities above quoted, and appellants have cited none to the contrary, is not the law; the second is untenable because the contract does not contain a clause either liquidating the damages or providing a penalty for the breach thereof. This has been fully shown in the above. It is anomalous, to say the least, for counsel for appellants, to insist

that clause 9th of the contract so far as it provides for a definite sum for the shortage there referred to is void under the Montana statute; and then to say it is good so far as specific performance of the contract is concerned; and the third is directly found by the master and the trial court upon the facts, in favor of appellees.

Consequently, even on appellants' suggestions the decree is correct.

But we submit, aside from this, that the decree of the lower court is right both on the facts and upon the law applicable to the case, and that the same should be affirmed.

All of which is respectfully submitted.

H. G. McINTIRE,
S. H. McINTIRE,
Solicitors for Appellees.

NO. 683.

IN THE

United States Circuit Court of Appeals.

FOR THE NINTH CIRCUIT.

HOME LAND & CATTLE COMPANY, a Corporation, and the NATIONAL BANK OF COMMERCE, a Corporation.

Appellants.

vs.

CORNELIUS J. McNAMARA and THOMAS A. MARLOW, Co-partners under the firm name and style of McNAMARA & MARLOW.

Appellees.

REPLY BRIEF OF APPELLANTS.

Appeal from the Circuit Court of the United States for the District of Montana.

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REPLY BRIEF OF APPELLANTS.

In the brief of Appellants heretofore filed in this case, we have laid down as one of our propositions that the respondents committed a breach of the contract in suit (Brief page 58), and in support thereof the following proposition was asserted:

"By their action in refusing to pay for a delivery of cattle, or to pay for any cattle thereafter delivered, except on their own terms, respondents attempted to insert a new term in the contract, a condition to which appellants were not obliged to submit so long as they were without default."

And in support of this proposition a large number of

authorities were cited (Brief p. 62-65:) Counsel for respondents have apparently misunderstood our contention upon this phase of the case, and assert that we have cited these authorities in support of the contention "That the *mere fact of* a failure on the part of a purchaser to make a payment on such a contract as this one entitles the vendor to rescind the contract on his part."

This misinterpretation of our views was perhaps natural in view of the criticism of the case of *Mersey Company vs. Naylor*, found at the bottom of page 63 of our brief. The language of this criticism is inaccurate and we desire to withdraw it. It has no bearing upon the argument which we were trying to make, nor if true, would it be necessary to support the proposition we were contending for.

The case of *Mersey Company vs. Naylor*, is correctly quoted in the paragraph preceding the criticism as laying down the rule that the failure to pay for an installment is not such a breach of the contract as entitles the vendor to rescind, *unless it shows an intention to be no longer bound by the contract.* With the exception to the rule thus expressed, the case is not only not opposed to reason, or the weight of authorities, but is directly in line with the cases cited by us and supports our contention as expressed in the proposition laid down at the commencement of this brief. Very full abstracts of the various opinions delivered in that case, are to be found in the opinion of the court in *West vs. Bechtel, 84 N. W. 68*, also cited by respondents, and it will be noted that each of the

Justices and the Lords of Appeal concur with Chief Justice Coleridge, who tried the case, in holding that "The true question is whether the acts and conduct of the parties evince an intention to be no longer bound by the contract." And the language of the Chief Justice in *Freeth vs. Burr*, is quoted with approval by Jessel M. R. as follows:

"Now non-payment on the one hand or non-delivery on the other may amount to such an act or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free. If you have the act so done on the one side, the other party, if he elects to be free, is no longer liable to perform his part of the contract."

And again Lindley L. J. says:

"Now I certainly do not pretend to reconcile all the cases on this subject. I can understand each case by itself, but there is a very considerable difficulty in reconciling them. It is not, however, necessary to do so. What we have to do is to extract from the cases some intelligible principle by which to be guided, and it appears to me that the principle is stated accurately in *Freeth vs. Burr, L. R. 9 C. P. 208*, by Lord Coleridge himself in delivering his judgment in that case. What he says as to the result of the case is 'The true question is whether the acts and conduct of the parties evince an intention no longer to be bound by the contract.' I think that is the fair way of testing each of these cases, and it appears to me that Lord Coleridge either lost sight of that in deciding this case, or drew an incorrect inference from the correspondence."

And the rule as thus laid down was followed in the case of *West vs. Bechtel*, cited by respondent, in this, that the trial court instructed the jury that to warrant the defendant in refusing to perform his part of the contract by the delivery of the wood that "It ought to be made to appear that there was not merely a refusal to pay at once for the portion already delivered, but the circumstances connected with the whole matter, the conduct of both parties, ought to be taken into consideration and it should be made to appear to warrant the defendant in refusing to further deliver, that the conduct of the plaintiff was such as indicated that he did not intend to perform his part of the contract."

And we have not contended and are not now contending for any other rule in this case. In our criticism of the decision in *Mersey Company vs. Naylor*, we meant to be understood as saying that the decision of Lord Coleridge upon the facts was more in accord with what we believed to be the weight of authority, to-wit: that such acts as were there in evidence evinced an intention to be no longer bound by the contract. See also *Roehm vs. Horst, 91 Fed. 345*, where a contention as to the legal status of the seller did not relieve the buyer from performance.

Counsel for respondents on page 12 of their brief cite the case of *Robertson vs. Davenport, 27 Ala. 574*, as holding that if the plaintiffs in that case had ceased to have the ability to comply with their contract, when the money which was sued for became due, and the defendant knew that fact, he might refuse to pay for the hams

sued for and might recoup his damages. That is exactly the proposition which we are contending for in this case. When the respondents found out that the appellants were unable to deliver the full nine thousand head, they might under certain circumstances have refused to accept further deliveries, or if deliveries had been made for which payment had not been made, they might have recouped their damages in an action by the appellants upon the contract for such payment. But that is as far as the authorities go. This distinction is very clearly brought out by Lord Bowen in the case of *Mersey Company vs. Naylor*, where he says:

"If Lord Bramble in *Honck vs. Muller*, is to be understood as saying that the doctrine can no longer be applied when the contract has been performed, it seems to me that this observation goes beyond what can be supported; for as the Master of the Rolls has pointed out many of the cases where one party was allowed to treat the conduct of another as putting an end to the contract, were cases in which the contract had been part performed. *A fallacy may possibly lurk in the use of the word 'rescission.'* It is perfectly true that a contract, as it is made by the joint will of the two parties, can only be rescinded by the joint will of the two parties; but we are dealing here not with the right of one party to rescind the contract, *but with his right to treat a wrongful repudiation of the contract by the other party as a complete renunciation of it.*"

And we thought that our meaning upon this proposition was made clear by our quotations from the articles in the Harvard Law Review. But for fear of further misunderstanding we again repeat that when the respondents ascertained that there would be a shortage of

the agreed number of steers, it was their duty to elect whether to refuse to accept further deliveries under the contract because of this shortage and sue for damages, or to continue performance of the contract until completion. They elected, by the acceptance of the delivery of October 21st, to continue performance of the contract and thereby kept alive the agreement on their part to make payments according to the terms of the contract. When they refused to make the payment, unless the appellants adjusted at that time the damages for the steer shortage, according to the void terms of clause nine, they attached a condition, which was not a part of the original contract, and which they had no right to do, thereby giving to the appellants the right to elect whether to proceed, or to accept such action on the part of the respondents as a repudiation of the contract on their part, which would excuse the appellants from further deliveries. These propositions, we again assert, are supported, not only by the authorities cited by the appellants, but also by the authorities quoted and relied upon by the respondents; and in view of the misunderstanding of counsel as to our contention, based upon an inaccurate expression of our views of the case of *Mersey Company, vs. Naylor*, we respectfully ask permission of the court to submit this brief in response to what has been said by the respondents.

Respectfully submitted,

W. E. CULLEN,
E. C. DAY,
W. E. CULLEN, JR.
Attorneys for Appellants.

No. 683

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

HOME LAND AND CATTLE COMPANY, a Corporation, and THE NATIONAL BANK OF COMMERCE in St. Louis, a National Banking Corporation,

Appellants,

vs.

CORNELIUS J. McNAMARA and THOMAS A. MARLOW, Copartners under the style and firm name of McNamara & Marlow,

Appellees.

Appellees' Brief in Reply to Additional Brief of Appellants.

H. G. McINTYRE,
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Filmer-Rollins Co., Print., 424 Sansome St., S. F.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

HOME LAND AND CATTLE COMPANY, a Corporation, and THE NATIONAL BANK OF COMMERCE IN ST. LOUIS, a National Banking Corporation,

Appellants,

vs.

CORNELIUS J. McNAMARA and THOMAS A. MARLOW, Copartners Under the Style and Firm Name of McNamara & Marlow,

Appellees.

No. 683.

Appellee's Brief in Reply to Additional Brief of Appellants.

The additional brief filed by appellants herein and served on appellees on May 10th, and to reply to which the Court allowed fifteen days, contains several misstatements and misconceptions of the record which should not be allowed to pass unchallenged.

It is not true that the master did not find that the animals, the delivery of which is sought in this action, were peculiarly needful to the appellees, for such need is explicitly found in findings Nos. 17 and 18, Record, page 35.

It is true that the master did not find that such cattle or others like them could not have been procured elsewhere, and hence it was that the request for a re-reference in that regard was made by appellees. (See Record, p. 43, subds. 2d and 3d.)

But this failure was an inadvertence, for the testimony in this behalf was direct, positive, and uncontradicted. Both the witnesses McNamara and Marlow testified that animals such a these, and for which their business arrangements had been made, could not have been procured elsewhere than from appellants at the time this suit was brought, and that the damage consequent on this could not be estimated in money. (See Record, pp. 355, 388, 471, 473, and pp. 395, 412, 414, 415, 475.)

This testimony brings the case directly within the rule announced by the Courts, that specific performance will be decreed where the things bargained for are so related to the situation and business arrangements of the purchaser that nonfulfillment would embarrass or impede him in his plans, threatening or involving a loss of profits which a jury could not correctly estimate. (See Authorities cited on pages 40 to 47 of our original brief.)

It is a total misconception to say that "the master found that the difference between the contract price and the market value of the cattle was five dollars a head."

One of the issues tendered in this case is that the delivery of the cattle contracted for extended over a long period of time, during which time there was liable to be large fluctuations in the value of cattle of the kind contracted for. (See Record, p. 7.)

This allegation is but a statement of a further principle entitling appellees to equitable relief. (See the citation from the 63 Md. 285, quoted on page 45 of our former brief.) The testimony showed this and hence finding 16 of the master. In this finding the master does not say that the difference between the contract and the market price was $5 per head, but that the value of animals of the kind contracted for fluctuated in 1897 and 1898, the value increasing $5 per head in 1897, and $7 in 1898.

In the light of this finding and the uncontradicted testimony (Record, pp. 399, 400) to the effect that the average value of the steers shipped out of this herd was $35.50 per head, it is idle to say that the shortage of beef steers is represented by a difference of $5 per head.

We have shown in our former brief, pages 35 and 36, that appellees paid the Cattle Company $2 per head more than the cattle were worth because of the guaranty contained in clause 9. This, on the basis of 16,000 head actually received (Finding 7, Record, p. 31), is $32,000. Had appellees received the 1865 head shortage they would have realized a profit on them of at least $10.50 per head, or a total of $19,582.50. Consequently, the loss to appellees is upward of $51,582.50, for which, under clause 9 of the contract, they can only receive $37,300. How, then, appellants can claim that under any circumstances the loss to appellees was but $9,300, or that in requiring them to live up to their contract and to perform it as far as they were able their property is "confiscated," is beyond our comprehension.

Nor is it true that in requiring them to live up to the contract, appellants were not given credit for all the property received from them. It is plain from finding 11 that on October 22, 1897, had appellants done what they had agreed to do, they would have been entitled to and would have received from appellees the full sum of $9,675, but by refusing to turn over the 500 head of horses their credit account was reduced by $10,000, so that instead of appellees being indebted to them, they are indebted to appellees. And this being so, the decree, necessarily, could not provide for either a credit or a payment to the defendants.

There is no word in either the findings or the testimony which justifies counsel's remarkable assertion that appellees "are confessedly retaining $38,450 of defendants' money." "As the case now stands," the appellants have received credit for and have been paid every penny they are entitled to, and at the same time they have paid over to appellees what they agreed to pay and which by their present attitude they are seeking to evade. An unwarrantable assertion is made on page 3 of this Additional Brief with regard to the opinion of the lower court. Now, although it is true the master found the solvency of the cattle company, still it must be borne in mind that this concern was not paying its current obligation as they matured. This was frankly admitted by its president, Mr. Niedringhaus. (See Record, p. 92.) This, under the rule announced in the Federal courts and in Mon-

tana, is the test of solvency, i. e., the ability to pay obligations as they mature in the usual course of business.

See Hayden vs. Chemical Nat. Bank, 84 Fed. Rep. 874.

Buchanan vs. Smith, 16 Wall. 277.

Stadler vs. First National Bank, 22 Mont. 217.

It should also be remembered that so far as assets in Montana are concerned neither appellant was in a position to respond to a judgment in favor of appellees.

In this regard the case here comes within the rule announced in Johnson vs. Brooks, 93 N. Y. 344, there the Court said: "Brooks [the defendant] is a nonresident of this State, and even assuming the case to be one [as I do not think it is] of doubtful equity, it could not be expected that any Court would send its suitors to a foreign tribunal when the defendant is within its own jurisdiction with property in hand wherewith to perform his obligation."

As we understand it, a specific performance will be decreed not only when the circumstances such as these suggested in the cases quoted in our former brief on pages 38 to 47 exist, but whenever the plaintiff is liable to meet with unusual difficulties in obtaining relief because of a breach of the contract, this rule being stated by the United States Supreme Court as follows:

"The enforcement of contracts not relating to realty by a decree for specific performance is not an unusual exercise of equity jurisdiction. Such cases are numerous both in English and American jurisprudence. They pro-

ceed upon the ground that under the circumstances a judgment at law would not meet the demands of justice; that it would be less beneficial than relief in equity; that the damages would not be an accurate satisfaction; that their extent could not be exactly shown, or that the pursuit of the legal remedy would be attended otherwise with doubt and difficulty.

"Judge Story, after an elaborate examination of the subject, thus lays down the general rule:

" 'The just conclusion in all such cases would seem to be that courts of equity ought not to decline the jurisdiction for a specific performance of contracts whenever the remedy at law is doubtful in its nature, extent, operation, or adequacy.' 2 Story Eq. Jur., sec. 728; see, also, Stuyvesant vs. Mayor of N. Y., 11 Paige, 414; Barr v. Lapsley, 1 Wheat. 151; Storer v. Ry. Co., 2 You. & C. (N, R.) 48; Wilson vs. Furness R. R. Co., L. R. 9 Eq., 28"; Express Co. vs. Railroad Company, 99 U. S. 200.

This is what Judge Knowles evidently had in mind when he said: "I think it may be treated as if insolvent in Montana. It had not the means wherewith to liquidate complainants' claims on account of the deficiency of the cattle above mentioned, if complainants paid to the defendant bank the amount due for the last delivery of cattle made to them; the cattle gathered by the defendant, the Home Land and Cattle Company, in the year 1898 were upon the range and scattered, and it would seem unjust to require a creditor to hunt them up in order to render them subject to his demand."

Not only would such a course have been difficult, but as the testimony shows, it would have been impossible to have the animals rounded up after October 22d. And again, if it could have been done, such remaining animals would not have sufficed to pay appellees' claim because of the shortage. They were worth only $15,256 (Finding 15, Record, p. 34), whereas, as we have seen, the shortage account was $37,900. To have paid for the animals delivered on October 21st and 22d and then sought relief for the Cattle Company's failure to keep its guaranty good would have necessarily entailed the cost and labor of a round-up, not in 1897, when it had become impossible, but in 1898. By such round-up only a partial satisfaction would have been realized, and further, an additional litigation in a State foreign to the one where the contract in question was to be performed would have become necessary. This, we apprehend, in the language of Johnson vs. Brooks, supra, no Court would exact of its suitors when the defendant was in its jurisdiction with property in hand wherewith to perform its obligation.

Again, in this additional brief, on page 7, the misstatement is made that on October 22d, 1897, the "appellees had collected for 148 head of strays, which at $25 is $3,700."

The record, as we have previously shown, contains nothing to justify this statement. On October 22d appellees had received reports from the Board of Stock Commissioners of 113 strays only. (See Finding 11, and testimony of Marlow, Record, pp. 341, 362.) During the year 1897 a total of 148 strays had been reported. (See

finding 8 and testimony of Marlow, Record, p. 362.) And as to the payment for these strays, Marlow testifies (Record, p. 361): "No payments were made on strays until the end of the season. I allowed for these strays on the 22d of October, all that we had returns for at that time." The date when the proceeds from the strays were received is definitely fixed as November 30th, 1897. (See Exhibit "G," Record, p. 611.) It follows, therefore, that in tendering the contract price of $25 per head on October 22d, appellees were giving appellants credit for all that was then due them. Some stress seems to be placed upon the form of the decree in this case, but inasmuch as no such point is covered by the assignment of errors herein, it is not now available. But aside from this the decree is the usual one in an action of this nature.

We think no further consideration need be given to this "additional brief." We contend that the master's findings are supported by the evidence; and that in the absence of a special finding in any particular, the presumption is that every fact necessary to sustain the decree was fully established, and the burden is upon appellants to show the contrary, every intendment being in favor of the decree.

That it appears from the evidence and findings in the case and the necessary inferences therefrom that the delivery of October 21st and 22d, and of which notice was given in writing, was intended to be and was the last delivery and the end of the round-up season of 1897, was then fixed and determined.

That appellant company was indebted at this time to the bank, to which it had assigned the moneys due under the contract in an amount nearly sufficient to absorb the entire proceeds of the sale and leaving no balance with which to liquidate the shortage due under clause 9 of the contract. That the appellants well knew the amount of this shortage and that if it were liquidated when due, viz., on the last delivery at the end of the round-up season, fixed by themselves at October 21st and 22d, there would not be sufficient money to satisfy the bank. Thereupon, with manifest bad faith, appellants, in the midst of the delivery, demanded payment for the cattle as delivered, without regard to the amount due for shortage, and broke off the delivery in the midst thereof.

That their intent was to secure payment in full and compel appellees to sue in a foreign jurisdiction for the shortage money is manifest, as is also their determination to plead in defense of any suit the alleged illegality of clause 9, upon the ground that said clause as they claim provided for a penalty. They sought to secure every advantage under said contract and to repudiate their just and reciprocal obligations thereunder. In the face of their announced intention to make the final delivery of the season on October 21st and 22d, they seek to evade the consequences of their positive declaration. While owing the entire amount found due for the shortage, they assert their right to be paid in full for the cattle as delivered, without regard to said shortage, and

impudently refer appellees to the Courts of Missouri, if they seek redress on that score. Under such conditions, the conduct of appellants was lacking in good faith and their unconscionable intentions too thinly disguised to warrant appellees in doing other than they did, when they insisted, as was clearly their legal right, that the mutual accounts should be then and there adjusted and settled.

The attempt to compel appellees to pay in cash and collect in a foreign jurisdiction at the end of a litigation, in which repudiation of clause 9 was to be the defense, does not appeal to the conscience of a Court of equity, and did not favorably impress the master to whom the case was referred nor the Court below, by whom the master's findings were approved.

The appellees had no other plain or adequate remedy than the one sought in this suit, and a Court of equity was fully justified in granting them the specific relief, against such manifest bad faith as has been exhibited by appellants throughout this transaction.

And, in conclusion, we submit: 1st. That appellees were clearly within their legal rights in requesting an adjustment of the mutual account existing between them and appellants on October 22d, 1897; 2d. That appellants, under the facts and circumstances disclosed by this record, were not justified in stopping the delivery due from

them on October 22d; 3d. That the conclusions of the master and the trial court were correct; 4th. That the decree is correct and should be affirmed.

All which is respectfully submitted.

May 14th, 1901.

H. G. McINTYRE,

S. H. McINTYRE,

Counsel for Appellees.

683

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

HOME LAND AND CATTLE COMPANY, a Corporation, and THE NATIONAL BANK OF COMMERCE, a Corporation,

Appellants,

vs.

CORNELIUS J. McNAMARA and THOMAS A. MARLOW,

Appellees.

PETITION FOR REHEARING.

H. G. McINTIRE,
S. H. McINTIRE,
FOR APPELLEES.

JOHN S. MILLER,
OF COUNSEL.

BARNARD & MILLER PRINT. CHICAGO.

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The Appellees respectfully submit to the Court that this case is one in which they may, with propriety, ask this Honorable Court to grant a rehearing; and they respectfully petition therefor upon the following grounds:

The appellees respectfully submit to the court that this case is one in which they may, with propriety, ask this Honorable Court to grant a rehearing, and they respectfully petition therefor upon the following grounds:

I.

The opinion of the court first states one of the contentions upon the part of the appellants to be

> "That the appellees cannot demand the specific performance of the contract for the reason that they themselves failed to carry out its provisions by refusing to pay the $23,325 which under the contract became due upon the delivery of the cattle which were turned over to and received by the appellees upon October 21st and 22nd."

And after considering some of the terms of the contract and facts in proof, the opinion states:

> "The appellees had no legal excuse, therefore, for refusing to pay the $23,375 which was due under the contract upon the delivery of the cattle on October 22nd. They had no right to withhold the money or to apply it on their claim for damages. Their damages, if any they sustained under the contract, had not been liquidated. By refusing to make the payment they violated a material provision of their agreement. Their refusal to pay justified the appellants in declining to make further delivery of cattle, and it effectually bars them now from suing in equity for the specific performance of the contract."

Passing by, to be considered later, the intervening portion of the opinion, which is above omitted, we here beg leave to submit that, in the above holding, the court has overlooked the rule, which has been laid down in many cases, and is here quoted from the decision of the Circuit Court of Appeals in the Sixth Circuit, in *Cherry Valley Iron Works* v. *Florence I. R. Co.,* 64 Fed. Rep., 572, as follows:

> "The contract being entire, as soon as the parties had entered upon its performance by partial delivery and payment, the mere failure of the vendee to make the subsequent payments would not of itself absolve the vendor from proceeding with the deliveries."

That decision follows the decisions of *Iron Co.* v. *Naylor,* 9 App. Cas., 434, in the English House of Lords, and *Norrington* v. *Wright,* 115 U. S., 188, 203, 204. And we beg here again to refer to the following cases, where the rule has been clearly laid down, which were cited in the former brief for appellees, and which, with great respect, we ask the court to consider:

> *Otis* v. *Adams,* 56 N. J. L., 38; s. c. 37 Atl. Rep., 1093.

Gerli v. *Poidebard Silk Mfg. Co.*, 57 N. J. L., 435; s. c. 31 Atl. Rep., 402.
Bogardus v. *N. Y. L. Ins. Co.*, 101 N. Y., 335.
Myer v. *Wheeler*, 65 Iowa, 390.
West v. *Bechtel* (Mich.), 84 N. W. Rep., 69.

We beg to ask the court's attention to the case of *Myer* v. *Wheeler*, 65 Iowa, 390. There the plaintiffs contracted to sell and deliver to the defendants ten carloads of barley, which plaintiffs had the right to deliver in lots of one or more cars at a time and draw on defendants for the amount of each separate delivery at the time it was made. Plaintiffs shipped one car and drew a draft for the same, which defendants refused to pay on the ground that the car did not correspond to the sample, and wrote plaintiffs that they had given them credit for the carload at the reduced price of five cents per bushel and that they would pay for drafts for future deliveries, but intended to retain the amount due on the carload received until all the barley should be delivered. Plaintiffs refused to assent to this, demanded payment for the carload delivered and informed defendants that they would deliver no more until such payment was made, but expressed a willingness to deliver the balance if such payment was made. No further deliveries were made, and plaintiffs sued defendants for the carload delivered. The price of barley had advanced. Plaintiffs were given judgment for the carload delivered, and defendants were awarded damages for the non-delivery of the nine carloads not delivered. This judgment was affirmed by the Supreme Court, who said:

> "The rule established by the decided weight of authority, both in England and this country, is that rescission of a divisible contract will not be allowed for a breach thereof unless such breach goes to the

whole consideration. *Freeth* v. *Burr,* L. R. 9 C. P., 208; *Mersey Steel & Iron Works* v. *Naylor,* L. R. 9 Q. B. Div., 648; *Simpson* v. *Crippin,* L. R. 8 Q. B., 14; *Newton* v. *Winchester,* 16 Gray, 208; *Winchester* v. *Newton,* 2 Allen, 492; *Sawyer* v. *Railway Company,* 22 Wis., 403; *Burge* v. *Cedar Rapids & M. R. R. Co.,* 32 Iowa, 101; *Hayden* v. *Reynolds,* 54 Iowa, 157; s. c., 6 N. W. Rep., 180. See, also, the collection of authorities on the subject in the note of Mr. Lucius S. Landreth to the case of *Norrington* v. *Wright,* 21 Amer. Law Reg., 395."

And we beg to ask the court to consider the case of *West* v. *Bechtel,* lately decided by the Supreme Court of Michigan and reported in 84 N. W. Rep., 69, which has many facts similar to the case at bar.

II.

If it be considered that the principle above invoked is one which involves the *legal* rights of the parties to the contract, when brought before the court in an action at law, and has no application in a suit in equity for specific performance where a remedy which is purely equitable and in great part discretionary is invoked, then we beg further to suggest:

We recognize that specific performance is a purely equitable remedy, and that it is held that the granting of it rests in the sound discretion of the court; that the inquiry may be whether in equity and good conscience the court ought to grant the relief, and that the court may hear evidence of and inquire into the circumstances under which the contract was entered into and concerning its subject-matter, which could not be done in an action at law.

Espert v. *Wilson,* 190 Ill., 629, 635.

But does the court here place its refusal upon such ground? It is submitted that this should be made clear.

If the court does not place its refusal solely on that ground, but goes upon legal principles which obtain in a court of law, then the rule laid down above in the first division of this petition clearly applies and controls.

But if the court conceives that legal rules and principles are not applicable here, but this case is determined on rules governing this equitable remedy, then we ask the court to consider whether these following considerations are not sound and whether they have been fully weighed by the court, viz.:

For the purposes even of a bill for specific performance, we respectfully submit that the contract and case, on this question, has been misconceived. After stating the above contention of appellants, the opinion proceeds:

> "The contracting parties, at the time of entering upon the contract, had estimated the herd of cattle at 30,000 head. It was known that it consisted of two grades, beef cattle and stock cattle. It was believed that of the former there were 9,000 head, and the Cattle Company so guaranteed. *The price of $25 per head for the whole herd was agreed upon on that basis.* The beef cattle were more valuable than the stock cattle. The testimony on behalf of the appellees is *that but for the guaranty that there were 9,000 head of the beef cattle, they would have paid no more than $23 per head for the herd.*"

In other words, in consideration of this guaranty by the appellants and of their undertaking to pay $20 per head for every head less than 9,000 of such beef cattle so delivered, the appellees on their part undertook to pay $2 per head more for a herd of 30,000 head than they would otherwise have paid. That is, appellees assumed the lia-

bility, in effect, to pay an amount which the parties expected would be $60,000 more because of this guaranty and agreement of appellants to pay $20 per head in case of shortage of 9,000 head of beef cattle; and the agreement of appellants in clause 9 was consideration for (*i. e.,* payment of) that undertaking of appellees. It is submitted that the following statement of the opinion, which immediately follows that above quoted, is not, as applied to this case, sound, but should be reconsidered, viz.:

> "It must be borne in mind that this provision for forfeiture of $20 per head for shortage in the stipulated number of beef cattle does not provide for general damages for breach of the contract. It does not relate to the stock cattle, nor does it contemplate damages for failure to deliver the full 30,000 head. If, for instance, there had been a delivery of 9,000 head of beef cattle under the contract and no other cattle whatever had been delivered the provision in the contract for forfeiture would not have applied to such a breach."

This provision is not a "provision for forfeiture." It provides not alone damages for shortage of beef cattle, but compensation for the undertaking of appellees to pay $25 per head for the herd, instead of $23.

The contract contemplated that there was a herd of 30,000 head of cattle. In considering the validity and meaning of the contract, or any clause thereof, and in arriving at the intention of the parties therein, that fact must be taken into consideration. The construction and validity of Clause 9 of the contract is to be arrived at in view of that contemplated fact and situation. Then it is to be taken that the appellees,—assuming here the situation and facts contemplated by the parties, that there was a herd of 30,000 cattle (if the appellants be given

the benefit of honestly believing that they had such a herd)—paid full consideration and equivalent for the undertaking of appellants to pay $20 per head for shortage of beef cattle. The appellees agreed to pay, and according to the contemplation of the parties would pay $60,000—viz.: $2 per head for 30,000 head—for this guaranty and undertaking of the appellants in clause 9. The said undertaking of appellants in clause 9 to pay $20 per head was not then a penalty. To say, then, that clause 9 "does not relate to the stock cattle," when appellees had agreed to pay so much more for them because of that clause, is, we submit, a misconception. To say that clause 9 "can be regarded in no other light than as a stipulation for penalty," is, we submit, a misconception. *Intent* of the parties at the time of making the contract is here controlling; and where, as here, the agreement of appellants in Clause 9 to pay $20 per head of shortage in beef cattle, was itself pay for something else which they got by the contract, then it is not a penalty, but is a valid agreement. *Johnston* v. *Cowen,* 59 Pa. St., 275; *California Steam Nav. Co.* v. *Wright,* 6 Cal., 258.

III.

The contract in question provided as follows:

> "That said party of the first part, for and in consideration of the sum of one dollar and other valuable considerations, hereby agrees to sell to said second parties all of their herd of stock cattle, including steers—said herd consisting of thirty thousand head (30,000) more or less, now ranging upon the ranges in Valley, Dawson and Custer Counties, Montana, and being branded as follows, to wit:" (1 Print. Trans., 13.)

It is respectfully submitted that the parties contemplated, and the vendors undertook and covenanted, that the herd of cattle consisted of 30,000 head, more or less. It was not, then, contemplated that the number of cattle actually to be found in the herd would be about 16,000; and the contract is not to be construed, or its validity or meaning or the intention of the parties arrived at, by considering its application to the case of a herd of 16,000 cattle. Its validity and the validity and nature of the agreements therein, are to be arrived at by looking at the contract and the intention of the parties therein, by considering its application to the herd of cattle which the parties contemplated was in existence and not to a herd consisting of a number which the parties did not contemplate. And this is true in considering the nature and validity of clause 9 of the contract, containing the guaranty of appellants that there should be 9,000 head of beef cattle, and their agreement to pay $20 per head for any shortage therein. This is true in equity, in a case of specific performance, where the court is freer to inquire into the circumstances under which the contract was entered into.

Espert v. *Wilson, supra.*

The *intent* of the parties is mainly to be considered in determining whether the agreement of appellants in Clause 9 is a penalty or not. *Sutton* v. *Howard,* 33 Ga., 536; *Sanford* v. *First N. Bank,* 94 Iowa, 680; *Gowen* v. *Gerrish,* 15 Me., 273; *Mead* v. *Wheeler,* 13 N. H., 275; *Hurd* v. *Dunsmore,* 63 N. H. 171; *March* v. *Allabaugh* 103 Pa. St., 335.

We submit that the opinion considers the validity and nature of clause 9 *as if the parties had contemplated a*

herd of 16,000 head, instead of a herd of 30,000 cattle. Is not this a misconception? Supposing there had been 30,000 head of cattle, as was contemplated by the contract, and there had been a shortage in the number of beef cattle of any amount, it will be seen that the provision of clause 9 of the contract had been more than paid for and was for only fair, indeed small compensation, for the consideration given therefor. Supposing there had been 1,000 head of shortage in the beef cattle; that is, suppose there had been 8,000 head of beef cattle and 22,000 head of stock cattle. In that event, according to the evidence, the appellees had paid for this agreement of appellees in clause 9, $2 per head on the cattle more than they would have paid; that is, they had paid $60,000 more than they would have paid but for the guaranty that there should be 9,000 head of beef cattle, while under clause 9 the appellees would receive $20 per head for the 1,000 short, or $20,000, which was very inadequate measure of compensation. Supposing there had been 2,000 head of beef cattle short. Then appellees would have received under clause 12, $40,000, under a clause for which they had paid $60,000. Supposing that the shortage of beef cattle was 3,000 head. Then, by the payment of the $20 per head under clause 9, appellees would only have received as much under clause 9 as they had paid to get it.

The fact that the appellants were unable to fulfill their covenant or the terms of their sale, to deliver the number of cattle which their contract contemplated and called for, does not entitle them to a more favorable ruling on the validity and nature or construction of the contract than they would receive if the herd had in fact consisted of 30,000 head. The court in arriving at the validity, nature and meaning of the clause of the contract in ques-

tion is to place itself in the situation of the parties at the time the contract was made. It is not to take the situation of the parties under circumstances which the parties never contemplated.

It is, therefore, respectfully submitted that the following portion of the opinion should be reconsidered:

> "There is no ground for the contention that the provision requiring the Cattle Company to pay the appellees $20 per head for all the beef cattle that fell short of the 9,000 head so guaranteed, is equivalent to a rebate from the purchase price upon the theory that the stock cattle were less valuable than the beef cattle."

Not merely "upon the theory that the stock cattle were less valuable than the beef cattle." But appellees made their agreement of purchase by which they agreed to pay $2 per head more for all the cattle—stock cattle and beef cattle—than they would have paid. That is quite a different theory. If they had purchased the herd without this Clause 9 (and had thereon gotten the 16,000 head as now) they would have paid therefor two dollars per head less; that is, for 16,000 cattle the sum of $32,000 less.

Has not the theory here been misconceived? It was equivalent to such rebate, on the theory, also, that appellants' payment to appellees of $20 per head of shortage of beef cattle should be taken as making them good for paying two dollars per head more for the entire herd. Considered as such a rebate, it corrected, with substantial or approximate fairness, this overpayment of $2 per head, under the circumstances here, of a delivery of 16,000 head.

The opinion proceeds:

> "The facts fully contradict this theory. It is proven that at the stipulated price of $25 per head the appellees, although they received less than the stipulated number of cattle, received better cattle than their contract called for. The number of cattle actually found to be in the herd, instead of 30,000 was about 16,000 head, but the proportion of beef cattle to the stock cattle in the herd as delivered was much greater than the proportion contemplated in the contract. By the terms of the contract considerably less than one-third of the herd were to be beef cattle. As the cattle were actually delivered nearly one-half were beef cattle. It is apparent, therefore, that there was no damage to the appellees by reason of the disparity in value between the stock cattle and the beef cattle which they had received; on the contrary, that disparity was to their advantage."

It is submitted that the opinion here has overlooked the fact that "disparity in value between the stock cattle and the beef cattle," which might, under any possible circumstances,—even under circumstances not contemplated by the parties or which were in breach of the appellants' covenant or undertaking,—exist, was not the damage for which the agreement in Clause 9, of appellants, to pay $20 per head for shortage of beef cattle, was intended as a compensation. Here, again, it is to be observed that the validity and nature of the agreement in clause 9,—*i. e.,* whether it is a penalty or otherwise,—is to be taken in view of the circumstances contemplated by the parties as existing, and which the appellants undertook and covenanted to exist, namely, that there were 30,000 head, more or less. If clause 9 was a fair and valid undertaking for a herd of 30,000 head, it was not less a fair and valid undertaking because the appellants failed to deliver 30,000 head. Appellees purchased and undertook

to pay $2 per head more for 30,000 head of cattle, for which agreement appellants covenanted that if there were less than 9,000 beef cattle they would pay $20 per head of such shortage. Now, the fact that appellants failed to deliver the 30,000 head and delivered only 16,000, does not make their undertaking a penalty which would have been a fair agreement if they had complied with their undertaking and delivered the 30,000 head.

The opinion continues:

> "The bill alleges, it is true, that the cattle under the contract possessed 'a special and peculiar value' to the appellees 'which could not be adequately compensated for in money damages.' This averment is evidently inserted for the purpose of showing that the case is one for specific performance; it does not relate to the beef cattle especially, but to the whole number of cattle contracted for. There is no averment in the bill that the beef cattle possessed special value and there is no allegation upon which it may be predicted that the appellees sustained special damages for the failure to deliver the beef cattle, or any damages other than those which resulted from the increase in value of the cattle. Not only is there no such averment, but there is no evidence whatever of such damage. It appears from the testimony that more than one-half of the beef cattle which were received by the appellees under the contract were, immediately upon delivery to them, at different times, consigned to the market at Chicago, and one of the appellees testified that no more than 1,000 head of them were used in filling their contracts with the Indian agencies, and that the appellees were not damaged so far as their beef contracts were concerned by the failure of the appellants to deliver the remainder of the 9,000 head. The provision for the payment of $20 per head for each head short of the 9,000 did not provide, therefore, for actual damages or for an equitable compensation to the appellees in case of a breach of the guaranty, *in any view of a possible deficiency in the guaranteed number of the beef cattle.*"

May we suggest that evidence as to the special value of the 457 head of cattle, as to which specific performance was decreed, has escaped the notice of the court. Appellee, Marlowe, testifies that they had such value (Pr. Trans., 350). And that a very considerable number of them (which in fact came into appellees' hands) were so used. (*Id.*, 351-2.) And so appellee, McNamara. (*Id.*, 473-4.) And his testimony showed that the appellees would be damaged in their beef contracts by not getting the beef cattle of the 457 head, and that such damage could not be estimated in money. (*Ibid.*) The fact that only part of the previous deliveries were used with the Indian agencies does not tend to show that future deliveries or the 457 head were not required for that purpose. Has not this evidence been overlooked? Is there not evidence of such special and peculiar value which sustains the findings and decree?

Again, the opinion in the last clause, above quoted, challenges us to suggest "any view of a possible deficiency in the guaranteed number of beef cattle," in which the provision of Clause 9 for payment of $20 per head of shortage would provide for equitable compensation.

Now, we beg to ask whether the supposed deficiency which the opinion then proceeds to assume, is not one which might be selected to sustain its view, but was not at all one which the parties contemplated in making the contract. It proceeds:

> "It can readily be seen, for instance, that if one-half of the 16,000 head delivered had been beef cattle there would have been a shortage of 1,000 beef cattle under the contract, involving a forfeiture of $20,000 for a breach which would have occasioned no damage whatever to the appellees; or if the 16,000 head delivered had been all stock cattle and there had been

> a total failure to furnish any beef cattle whatever, the forfeiture would have been $180,000, a sum vastly in excess of any possible damages."

Suppose, on the other hand, there had been 30,000 head, as the parties contemplated, and of that herd 6,000, 7,000 or 8,000 (and not 9,000) were beef cattle and the rest were stock cattle. We submit that the question of the validity of clause 9 is to be considered, not as if the parties had contracted in contemplation or reference to a herd of 16,000 head; but a herd of 30,000 head. In the case, we supposed, *i. e.,* a herd of 30,000 head but a shortage of 1,000, 2,000 or 3,000 head in beef cattle; would the following conclusion of the opinion be sound:

> "In short, it is evident under the facts of the case that the appellees could sustain no injury from the breach of the guaranty except that which resulted from the increase in the value of the beef cattle during the season of 1897, a contingency that was not foreseen, the amount of which increase could not be pre-estimated, and which the referee has found was in fact $5 per head, a sum greatly disproportionate to the stipulated forfeiture. The provision can be regarded in no other light, therefore, than as a stipulation for a penalty. It calls for the payment of a sum of money greatly in excess of the actual damages, and it is a case where the damages could have been easily ascertained by proof of the market value of the cattle at the time of the breach of the contract. Such provisions the courts uniformly refuse to sustain, leaving the party injured by the breach to his remedy at law for the recovery of his actual damages. 1 Sutherland on Damages, 490."

IV.

The contract in question was made in Illinois, and not in Montana. (1 Print. Trans., 12.)

The portion of clause 9 by which the appellants undertook to pay to appellees the $20 per head for shortage of beef cattle, provides that should the appellants fail to deliver to appellees during the season of 1897 not less than 9,000 head of beef cattle, "they hereby agree to pay to said second parties the sum of twenty dollars ($20) in cash for each and every head less than nine thousand (9,000) head of such cattle so delivered." (*Id.*, p. 15.) That covenant to pay is not, by its terms, to be performed in Montana. Other portions of the contract are to be performed, some in Chicago, Illinois, and others in Montana. It is submitted that the validity and nature of the clause in question, for the payment of the $20, is not governed by the laws of Montana, but by the *lex loci contractus,* namely, the laws of Illinois. *Brown* v. *American Finance Co.,* 31 Fed., 516; *Annheuser-Busch Brewing Assn.* v. *Bond,* 66 Fed., 653, s. c., 13 C. C. A., 665, 32 U. S. App., 38.

It will be borne in mind that the guaranty of the appellants to deliver 9,000 head of beef cattle was valid and free from any question; it is only the validity of the covenant of the appellants to pay which is here involved. It is submitted that that is to be governed by the laws of Illinois, where the contract was made.

Now, by the laws of Illinois, the undertaking of the appellants to pay the $20 per head would not be invalid, but is valid. In *Paine* v. *Weber,* 47 Ill., 41, the court

said that "unless there is good cause for it a court cannot declare a stipulated sum which the parties themselves have said to be the amount of damages, to be a penalty merely."

In *Poppers* v. *Meagher,* 148 Ill., 192, 205, the court, after considering the previous decisions of that court, said:

> "The rules deducible from these cases may be stated: First, where, by the terms of a contract, a greater sum of money is to be paid upon default in the payment of a lesser sum at a given time, the provision for the payment of the greater sum will be held a penalty; second, where, by the terms of a contract, the damages are not difficult of ascertainment according to the terms of the contract, and the stipulated damages are unconscionable, the stipulated damages will be regarded as a penalty; third, within these two rules parties may agree upon any sum as compensation for a breach of contract."

This case is one not governed by the first or second of said rules, but is clearly a case where the third rule applies.

In further support of this petition, we beg to refer to the former brief for appellees; and to ask that upon consideration thereof and of this petition this case may be reheard.

Respectfully submitted.

H. G. McIntire,
S. H. McIntire,
Solicitors for Appellees.

The undersigned counsel for appellees in the above case certifies that in his judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

(Signed) H. G. McIntire,
John S. Miller.